

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8

NORTON ANTHONY RUSSELL, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1960

CERTIORARI GRANTED JUNE 19, 1961

SUPREME COURT OF THE UNITED STATES

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[fol. A.]

[File endorsement omitted]

[fol. 1]

**IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 13,529

NORTON ANTHONY RUSSELL, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

**Appeal From the United States District Court
for the District of Columbia**

Joint Appendix—Filed December 17, 1956

[fol. 2]

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NOTICE OF APPEAL—Filed June 11, 1956

Name and address of appellant

**Norton Anthony Russell, 1540 President St., Yellow
Springs, Ohio.**

Name and address of appellant's attorney

Joseph A. Fanelli, 1701 K St., N. W., D. C.

Offense Contempt of Congress

**Concise statement of judgment or order, giving date, and
any sentence**

**6/11/56 Judgment by J. Christenson—\$500 Fine, and
30 Days in Jail, Fine & Jail Sentence to be con-
current on all counts**

Name of institution where now confined, if not on bail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

June 11, 1956
Date

Norton A. Russell, Appellant.
Joseph A. Fanelli, Attorney for Appellant.

[fol. 3]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding a Criminal Term

(Grand Jury Impaneled on September 30, 1954,
and Sworn in on October 5, 1954)

Criminal No. 1230-'54

Grand Jury Original (2 U.S.C. 192)

UNITED STATES OF AMERICA,

v.

NORTON ANTHONY RUSSELL.

The Grand Jury charges:

INTRODUCTION—Filed December 15, 1954

On November 17, 1954, in the District of Columbia, a subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session, (60 Stat. 828), and to H. Res. 5, 83d Congress.

Defendant, Norton Anthony Russell, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those

pertinent questions. The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition [fol. 4] merely describe the question which was asked of the defendant and which he refused to answer.

Count One

With that explanatory statement, I would like to ask you again to tell the committee what was the occasion of your seeing Herbert Reed in the mid-forties?

Count Two

Whether you did or whether you didn't join [the Communist Party] at that time, did he [Herbert Reed] encourage you to join?

Count Three

I want to know whether Herbert Reed had anything to do with your getting into the Communist Party.

Count Four

Did you have any knowledge of the existence of that group [an organized group of the Communist Party in Yellow Springs] in 1945 or 1946?

Count Five

Do you have any knowledge of your own of the extent of membership in the group [of the Communist Party in Yellow Springs]?

Count Six

Did you ever attend any of the meetings of that group?

[fol. 5]

Count Seven

Were you a member of the Communist Party at the time you went over there to work in Yellow Springs in 1948 at the Vernay Laboratories?

Count Eight

What were the circumstances under which you met him [Arthur Strunk]?

Count Nine

He [Arthur Strunk] was known to you as the treasurer of the Communist Party in the Dayton area?

Count Ten

Is his [Arthur Strunk's] statement correct or is it false, that Communist Party meetings were held in your home while you lived in Greenmont Village?

Count Eleven

He [Arthur Strunk] stated that you paid Communist Party dues to him. Did you?

Count Twelve

You have indicated that [some other reason for your discharge by United Aircraft Produce Corporation] by your expression. What was that other reason?

[fol. 6]

Count Thirteen

At the time you took your employment with United Aircraft, were you a member of the Communist Party?

Count Fourteen

Was he [Walter Lohman] known to you to be a member of the Communist Party?

Count Fifteen

Did you attend any Communist Party meetings with him [Walter Lohman]?

Count Sixteen

Did Mr. Lohman ever attend a Communist Party meeting at your home?

Leo A. Rover, United States Attorney in and for the District of Columbia.

IN UNITED STATES DISTRICT COURT**PLEA OF DEFENDANT—Filed January 7, 1955**

On this 7th day of January, 1955, the defendant Norton A. Russell, appearing in proper person and by his attorney Joseph A. Fanelli, Esq., being arraigned in open Court [fol. 7] upon the indictment, the substance of the charge being stated to him, pleads Not Guilty thereto.

Bond set by the Court in the amount of \$1000.00.

The Defendant is committed to the District Jail for bond.

The defendant is granted until 2-15-54 for filing appropriate motions.

By direction of Charles F. McLaughlin, Presiding Judge, Criminal Court #1.

IN UNITED STATES DISTRICT COURT**MOTION FOR HEARING ON QUALIFICATIONS OF GRAND JURORS
—Filed February 11, 1955**

Defendant moves the Court to order a hearing for the purpose of inquiring into the qualifications of the grand jurors who found the indictment in this action.

The list of grand jurors in the Clerk's office shows that of the 23 members of the grand jury which indicted defendant 11 were employees of the Federal Government and two were employees of the District of Columbia Government. A list of these 13 jurors, with the agency of the [fol. 8] Federal Government or of the District of Columbia Government by which each of them was employed, is attached hereto and marked Exhibit A.

A hearing on the qualifications of the grand jurors is requested so that defendant may produce evidence to establish that Government employees may not properly serve on a grand jury to return an indictment for contempt of the House Committee on Un-American Activities, because the pressures resulting from the loyalty and security programs deprive Government employees of impartiality and render them incompetent to consider without bias the issues involved in this case.

Defendant also wishes to examine each of the 13 grand jurors referred to above in order to establish the impact on them of the loyalty and security programs and thus to show that in each instance actual bias existed.

Joseph A. Fanelli

EXHIBIT A TO MOTION

October 1954 Regular Grand Jury

Number	Name	Government Agency
1	Robert J. Alpher	Civil Aeronautics Administration
[fol. 9]		
2	Kenneth Anderson	Intelligence, State
3	Miss Gladys E. Augustin	Public Assistance (D.C.)
4	Robert B. Austin	Defense Department
6	Wilson T. M. Beale (foreman)	International Affairs, State
7	Andrew F. Berry	Dept. Vehicular Traffic (D.C.)
8	Howard C. Bond	Naval Gun Factory
9	Herman J. Bregnan	Post Office (D.C.)
11	William D. Dyan	Naval Gun Factory
12	Joseph Epps	St. Elizabeth Hospital
18	Mrs. Mildred L. C. Pontious	Agriculture Department
20	Miss Naszha A. Rattal	State Department
22	John M. Spence (deputy foreman)	Navy

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS INDICTMENT—Filed February 11, 1955

Defendant moves that the indictment herein and each individual count thereof be dismissed on the following grounds:

1. The contempt statute, 2 U.S.C.A. Section 192, is unconstitutional on its face and as construed and applied herein, because:

[fol. 10] a) It exceeds the bounds of the constitutional power of Congress to investigate in aid of its legislative jurisdiction;

b) It is vague and indefinite and fails to provide ascertainable standards of conduct, in violation of the Fifth and Sixth Amendments;

c) It violates the First Amendment.

2. Section 121, Legislative Reorganization Act of 1946, subsection (q)(2) and House Resolution No. 5 of the 81st Congress creating the House Committee on Un-American Activities are unconstitutional on their face and as construed and applied herein because:

a) They are vague and indefinite and fail to provide ascertainable standards of conduct, in violation of the Fifth and Sixth Amendments;

b) They exceed the bounds of the constitutional power of Congress to investigate in aid of its legislative jurisdiction, in violation of the Ninth and Tenth Amendments.

c) They violate the First Amendment.

3. The indictment fails to charge an offense under the laws of the United States because the questions asked exceeded the bounds of legislative inquiry and were not pertinent to any question properly under inquiry before the Committee.

4. The indictment fails to charge an offense under the laws of the United States.

5. The indictment fails to charge an offense under the laws of the United States because it fails to allege that defendant was directed by the Subcommittee to answer the questions set forth in the indictment.

6. The indictment omits an essential element of the alleged offense because it fails to state the respects in which it is claimed that the questions put to defendant which he refused to answer were material or relevant to the inquiry of the Committee.

7. The indictment violates the Fifth Amendment and Rule 7 of the Federal Rules of Criminal Procedure because it fails to provide defendant with adequate notice of the offense with which he is charged.

8. The indictment was not found by a sufficient number of grand jurors who were qualified and free from bias and prejudice against defendant.

9. The indictment fails to state an offense against the laws of the United States because the information sought in the questions put to defendant was in the possession of the Committee; and, in addition, because the questions related to acts and conduct that had taken place many years [fol. 12] prior to the hearing at which the alleged contempt occurred.

10. The indictment is invalid because it charges defendant with many offenses, although the alleged acts were continuous and, if illegal, constituted only one offense.

• • •

In *Emspak v. United States*, *Quinn v. United States*, and *Bart v. United States*, now pending before the Supreme Court of the United States (U.S. Sup. Ct. Oct. Term 1954 Nos. 9, 8, and 117, respectively), the decision of the Supreme Court may settle, and at a minimum, should authoritatively illuminate the contentions advanced in Paragraphs 1 to 8 inclusive. By order of this Court trial in this case has been postponed pending the decision of the

Supreme Court of the United States in *Emspak*. For these reasons it is respectfully suggested that the Court reserve decision on Paragraphs 1 to 8 inclusive of this Motion until the Supreme Court has made its decision.

Joseph A. Fanelli

[fol. 13]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT—Filed February 11, 1955

I, Joseph A. Fanelli, being duly sworn, depose and say that:

1. I am the attorney representing the defendant in the above criminal action.

2. This affidavit is submitted in support of defendant's Motion to Dismiss and his Motion for Hearing on Qualifications of Grand Jurors.

3. Of the 23 members serving on the grand jury which found the indictment against defendant, 11 were employees of the Federal Government (including the Foreman who was employed by the Department of State) and 2 were employees of the District of Columbia Government. As shown below, these 13 were disqualified by bias, and accordingly there were less than 12 grand jurors qualified to find the indictment.

4. Defendant is charged with contempt of the House Committee on Un-American Activities. The official transcript of defendant's testimony shows that the Committee believed defendant to have been a Communist. The questions which form the basis of the indictment deal with defendant's alleged association with Communists. All this information was available to the grand jury and the finding of the indictment makes it clear that the grand jury had this information.

[fol. 14] 5. For several years the Federal Government has carried on a sustained and increasingly more vigorous campaign to drive out of Federal employment, as "disloyal" or "security risks," any of its employees who have

shown any sympathy for or tolerance of Communists. As early as 1948 Mr. Justice Jackson gave recognition to that campaign in *Frazier v. United States*, 335 U.S. 497, 515: "Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands . . . unquestioning ideological loyalty."

6. The Government loyalty program had its inception with Executive Order 9835, in March 1947, known as the Truman Loyalty Program. The Order came into operation late in 1947, when the program was administratively implemented. A frequent charge under the Executive Order was "sympathetic association" with Communists.

7. The program of ridding the Government of employees suspected in some way of being disloyal was intensified by Executive Order 10450, issued April 27, 1953, known as the Eisenhower Security Program. Under that Order charges of "sympathetic association" are continued, and the Order also provides for "security-risk" discharge in the case of any behavior which tends to show "that the individual is not reliable or trustworthy." The Order affords no appeal from an adverse agency finding.

8. The loyalty and security programs have received wide publicity in the daily press, and every Government employee must be keenly aware of their existence and operation. Government employees would generally know that the F.B.I. screens all applicants for Federal jobs, and investigates any Government employee against whom an accusation is made, however slight, of any indication of sympathy for a Communist.

9. Wide publicity has been given to the following actions by various Members of Congress and by the House Committee on Un-American Activities:

a) They have insistently called for a purge of Federal employees charged with disloyalty;

b) They have repeatedly accused Government supervisory officials of "harboring" disloyal employees, or being "soft" to Communism;

c) They have sought to cross-examine members of loyalty and security boards for the offense of clearing employees;

d) They have attacked witnesses who refused to answer questions before the House Committee on Un-American Activities, and persons who spoke up in defense of the rights of such witnesses.

[fol. 16] 10. Prior to the handing down of the indictment in this case, newspaper headlines announced that the Eisenhower Security Program had turned up 8,008 "security risks." Although the number discharged under the program for disloyalty appeared to be much smaller, there was considerable uncertainty as to the exact number, and Government employees must have been left with the impression that a great many had been found disloyal, the bulk of whom had received clearance under the Truman Loyalty Program.

11. During the past two years wide publicity has been given to Government officials attacked by prominent Members of Congress as disloyal. These include: John Carter Vincent, forced to resign after repeated loyalty-security clearances; Dr. Edward U. Condon, forced out of the Government service after repeated clearances, and later forced to resign his private employment at the threat of another investigation; and John Paton Davies, who survived seven or eight loyalty-security investigations and then was fired as a security risk although the Secretary of State specifically found him to be loyal.

12. Government employees fear a security investigation because it is the first step in a process which may end with the frightful consequences of a security discharge. Judge Edgerton, dissenting in *Bailey v. Richardson*, 182 F. 2d 46, [fol. 17] 66 (1950), referred to these consequences: "Ostracism inevitably followed. A finding of disloyalty is closely akin to a finding of treason. The public hardly distinguishes between the two."

13. Government employees are under an intense and unrelenting pressure to prove their lack of tolerance for

anything and any person connected with Communism and to evidence their active hostility for Communists and those connected with Communists. The drive for ideological loyalty, and the loyalty-security programs, are believed to have had a two-fold effect on a Government employee serving on a grand jury. He is predisposed against a person charged with any connection with Communists, without himself being conscious of bias against the defendant. Also, he knows himself to be under pressure to show an anti-Communist bias, in any case where the issues bear the slightest relation to Communism. It is hopeless to expect from such a juror the impartiality which might lead him to vote against an indictment in a case such as defendant's.

14. Affiant respectfully refers the Court to an affidavit dated October 31, 1952, by Dr. Marie Jahoda, a social psychologist, submitted in support of a Motion in this Court in *United States of America v. Weinberg*, Criminal No. 829-52. In 1951-52 Dr. Jahoda made a study of the impact of loyalty and security measures on Government employees in Washington, D. C. In her affidavit she concludes:

[fol. 18] "11. Based on my knowledge as a social psychologist, on the study of relevant literature, and above all on the exploratory study discussed above, it is my firm opinion that under present conditions there is a great likelihood that many federal employees are not in a position of passing fearless and unbiased judgment on matters in any way concerning loyalty, security or charges of communism. It is my opinion also that many government employees will at present be reluctant to disagree with official accusations that a person was a communist or associated with communists for fear that if they disagreed, they themselves would become suspect and subject to investigation. I am further of the opinion that the fear which was so evident in our interviews is the result not of a bad conscience, but of the present climate of opinion among federal employees which engenders suspicion and fear, regardless of innocence or guilt."

Affiant respectfully refers to a similar affidavit by Dr. Stuart W. Cook, Head of the Department of Psychology, Graduate School of Arts and Science, New York University. Dr. Cook collaborated with Dr. Jahoda in her study of the impact of loyalty and security measures on Government employees in Washington, D. C. His affidavit also appears in the record in *United States v. Weinberg, supra*. Dr. Cook states:

"8. . . . It is my opinion that under present conditions in Washington, D. C. such employees are not sufficiently free from the fear of personal consequences to pass unbiased judgment on charges involving loyalty, security or communism. Such employees, I believe, are unable to free themselves of the possibility that if they disagree with official accusations that a person is a communist or is associated with communists, this will become a part of their own records and eventually play a role in an investigation of their own loyalty and security."

[fol. 19] 15. If a hearing is granted pursuant to Rule 12(b)(4) of the Federal Rules of Criminal Procedure, affiant believes he can show, by examination of the grand jurors and otherwise, that those grand jurors who are employed or whose spouses are employed by the Federal Government or the District of Columbia Government:

a) Know of friends or acquaintances who have been investigated or suspended or dismissed in the course of the loyalty-security programs;

b) Know that persons have been investigated or suspended or dismissed on the basis of unfounded rumor or gossip or malicious accusations;

c) Believe that the security program frequently operates harshly and that persons have been investigated or suspended or dismissed without any rational basis for thinking that the nation's security is in any way affected;

d) Believe that persons have been investigated or suspended or dismissed for conduct that occurred many years previously, for associations slight or casual in nature, or for associations by spouses or relatives;

e) Fear that a vote by a juror against indictment, in a case such as defendant's, would lead to a security investigation of the juror and the risk of suspension or dismissal.

[fol. 20] 16. At such a hearing a showing will be made that:

a) The loyalty-security programs have created, among Government employees, a climate of fear and intimidation and apprehension, an atmosphere so pervasive and so powerful that a Government employee is disposed to refrain from doing anything which could conceivably be regarded as an indication of the slightest tolerance of Communism or lack of hatred for Communism, and that a refusal to indict a person for contempt of the House Committee on Un-American Activities might well be regarded as such an indication:

b) This climate of fear has been magnified during the past two years by press reports which have vividly pictured the range, the severity and the harshness of the Eisenhower Security Program;

c) Because of this climate of fear, the grand jurors who were employees of the Federal Government or the District of Columbia Government, or whose spouses were so employed, could not be fair or impartial in considering an indictment against defendant, and were biased in voting in favor of the indictment.

17. If a hearing is granted, defendant plans to call, in addition to the grand jurors, the following witnesses to [fol. 21] establish the facts set forth above: officials administering the loyalty and security programs; Allan

Barth of the *Washington Post and Times Herald*, author of a study of the loyalty program; Joseph Young, writer of the Government employees column in the *Washington Star*; Professor Ralph Brown of Yale Law School, author of articles on the loyalty and security programs; Professors Jahoda and Cook of New York University; and other competent and impartial observers of the effects on Government employees of the loyalty and security programs, congressional investigations and accusations by Members of Congress.

Joseph A. Fanelli

Subscribed and sworn to before me this 11th day of February 1955, Lucille M. Buins, Notary Public. My commission expires July 31, 1959.

[fol. 22]

IN UNITED STATES DISTRICT COURT

ORDER DENYING DEFENDANT'S MOTIONS FOR HEARING ON
QUALIFICATIONS OF GRAND JURORS AND TO DISMISS IN-
DICTMENT—February 25, 1955

On this 25th day of February, 1955, came the attorney of the United States, and the defendant by his attorney, Joseph Fanelli, Esquire; whereupon the defendant's motions for hearing on qualification of grand jurors and to dismiss the indictment, coming on to be heard, after argument by counsel, are each denied.

By direction of Edward M. Curran, Presiding Judge,
Criminal Court #3.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No.

Criminal No. 1230-54

UNITED STATES OF AMERICA,

v.

NORTON ANTHONY RUSSELL.

SUBPOENA—February 7, 1956

PERSONALLY

To Mrs. Juliet Jaray, Clerk, Committee on Un-American Activities, House of Representatives, Congress of the United States.

You are hereby commanded to appear in the United States District Court for the District of Columbia at 3rd [fol. 23] & Constitution Ave., N. W. 2nd Floor, Courtroom 3, in the city of Washington on the 13th day of February 1956 at 10:00 o'clock A.M. to testify in the case of United States v. RUSSELL and bring with you the following material from the files of, and otherwise in the possession and control of the Committee on Un-American Activities of the House of Representatives: (1) all records, files, memoranda, documents and other written information (other than cross references and duplications) relating to each person or organization listed in Schedule A attached hereto and made a part hereof, and including, without limiting the foregoing, (2) the file or files, including but not limited to files referred to by the Committee on Un-American Activities as public files and those referred to by the said Committee as investigative or confidential files, on each person or organization listed in Schedule A, and (3) all card records on, and histories of, each person or organization listed in Schedule A and all material upon which such records and histories are based.

This subpoena is issued upon application of the defendant.

February 7, 1956

Joseph A. Fanelli, Attorney for Defendant, 1701 K Street, N. W.

Harry M. Hull, Clerk, By Lawrence Proctor, Deputy Clerk.

[fol. 24]

SCHEDULE A TO SUBPOENA

1. Norton Anthony Russell
 2. Herbert Reed
 3. Communist Party in Yellow Springs, Ohio, *only*
 4. Arthur Strunk
 5. Walter Lohman
-

U. S. MARSHAL'S RETURN OF SERVICE

FOR THE DISTRICT OF COLUMBIA

Case No. 1230-54

U. S.

VS.

NORTON A. RUSSELL

Summoned the within-named by delivering a true copy of subpoena to:

Name	Address	How	Date
Mrs. Juliet Jaray	225 HOB	Pri	2/9/56 2 PM

Carlton G. Beall, United States Marshal, By John L. Sullivan, Deputy.

[fol. 25]

IN UNITED STATES DISTRICT COURT

MOTION TO QUASH SUBPOENAS—Filed May 23, 1956

Comes now the United States, by the United States Attorney for the District of Columbia, and moves this Honorable Court to quash the subpoena *duces tecum* served herein on February 7, 1956, upon Mrs. Juliet Jaray, Acting Clerk, Committee on Un-American Activities, House of Representatives, Congress of the United States, and an identical subpoena addressed to and served on the same date upon Ralph R. Roberts,¹ Clerk of the House of Representatives, Congress of the United States, for the following reasons:

1. Rule 17(c) of the Federal Rules of Criminal Procedure, which authorizes the issuance of subpoenas *duces tecum*, does not require the government to produce the documents sought by the defendant, because they are not "evidentiary."
2. Compliance with the subpoena would be unreasonable and oppressive.
3. The subpoena is a "fishing expedition."
4. Some of the documents called for would disclose the identity of confidential informants.
5. Most of the documents called for in the subpoena, apart from their being in the possession of the legislative branch are, in themselves, confidential with respect to their content and their purpose.
6. The court is without jurisdiction to direct the House of Representatives to produce its records.

Oliver Gasch, United States Attorney, William Hitz,
Assistant United States Attorney.

¹ Copy attached.

IN UNITED STATES DISTRICT COURT

**Charge Vio. 2 U.S. Code 192
(16 Counts)**

[Title omitted]

**ORDER GRANTING MOTION TO QUASH SUBPOENAS
—May 24, 1956**

On this 24th day of May 1956 came the attorney of the United States; the defendant in proper person and by his attorney, Joseph A. Fanelli, Esquire; whereupon Government's motion to quash subpoenas, coming on to be heard, after argument by counsel, is by the Court granted.

By direction of H. Sherman Christenson, Presiding Judge, Criminal Court #6.

[fol. 27]

IN UNITED STATES DISTRICT COURT

**MOTION FOR A DIRECTED VERDICT, OR IN THE ALTERNATIVE
FOR A JUDGMENT OF DISMISSAL—Filed May 31, 1956**

Comes now the defendant, by his counsel herein, and respectfully moves the Court to enter a directed verdict or judgment of dismissal. The grounds of this Motion are these:

1. As to all counts—The proof fails to show as required by the statute that defendant appeared before any Committee of the Congress or that there was any Committee sitting to conduct an inquiry at any time during defendant's testimony; for the proof fails to show that there was any quorum of a properly constituted body present at any time during defendant's testimony.

2. As to all counts—The indictment if it charges a crime, charges contempt of a Subcommittee of the House Un-American Activities Committee. The proof, so far as it shows a crime at all, shows only a contempt of the House

Un-American Activities Committee, itself, or, at best, that the jury will be left to speculate as to whether defendant appeared in Washington before the Committee or a Subcommittee. Defendant cannot be charged with one crime and convicted on another.

3. As to count Four—The proof fails to show that the defendant was apprised that the Committee demanded his answer notwithstanding his objections.

[fol. 28] 4. As to all counts—The indictment fails to allege that defendant's refusal to answer was wilful or deliberate and intentional.

5. As to counts Two and Three—The proof shows that the questions specified in counts Two and Three are the same question. The government cannot multiply offenses by asking precisely the same question in two different wordings. Both counts are bad for duplicity.

6. As to count Fourteen—The proof shows that defendant did answer the question specified in that count.

7. As to all counts—The indictment fails to allege that what question was under inquiry at the time of defendant's testimony.

8. As to all counts—The indictment fails to allege that the procedure required by Section 194 of Title 2 of the United States Code was followed.

9. As to all counts—The proof shows that if defendant committed any crime of contempt, the crime was committed when, before any of the questions specified in the indictment, he made it clear that he was not going to answer any questions involving Communist Party membership or activities on his part.

10. As to all counts—The proof fails to show that in questioning defendant the Committee was pursuing a legislative purpose. Rather, the proof shows that defendant was called to testify in order to punish him for contempt.

[fol. 29] 11. As to all counts—The questions specified in the indictment were not within the Committee's powers.

Respectfully submitted,

Joseph H. Freehill, Counsel for Defendant, 1701 K Street, N. W., Washington '6, D. C.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS TO CHARGE—Filed May 31, 1956

Request No. 1

The presumption of innocence which the law affords to the defendant in this and every other case means, in so far as this case is concerned, that the defendant is presumed not to have been in contempt when he testified before the House Un-American Activities Committee. The Court charges you that the defendant is presumed to be innocent, and you are directed to presume him innocent, unless and until you have been satisfied to a moral certainty and by clear, convincing, direct and positive evidence beyond a reasonable doubt that he is guilty. (Judge's penciled note "Refused in form granted as to substance")

Hart v. United States, 131 F 2d 59 (C.C.A. 9)

[fol. 30]

Request No. 2

"Reasonable doubt" means a doubt of such quality as would cause you to hesitate and pause in reaching some important decision required to be made by you in your private lives. If you can draw reasonable conclusion other than guilt from the evidence, you must acquit defendant. If, when all the facts in evidence have been considered, you are not abidingly convinced to a moral certainty that the defendant is guilty, then you have a reasonable doubt and must acquit the defendant. (Judge's penciled note "given in substance")

Hopt v. Utah, 120 U.S. 430, 439 (1877)

United States v. Brunett, 53 F. 2d 219, 234

United States v. Remington (S.D.N.Y., 1st case)

Request No. 3

The law requires the prosecution in a criminal case to prove its charge against a defendant beyond a reasonable doubt and does not require the defendant to disprove the charge against him. It is defendant's privilege to testify or not to testify, as he sees fit. (Judge's penciled note "given in substance")

Request No. 4

The fact that the defendant did not testify at this trial does not create any presumption against him. The Court charges you that you must not permit that fact to weigh [fol. 31] in the slightest degree against the defendant. Nor should that fact enter into the discussions or deliberations of the jury in any manner.

Bruno v. United States, 308 U.S. 287, 292 (Judge's penciled note "given in substance")

Request No. 5

The indictment by the grand jury is no evidence whatsoever of the defendant's guilt. An indictment is nothing more or less than an accusation in writing without probative or evidentiary force or effect.

(As charged by trial judge in *United States v. Remington* (S.D.N.Y., 1st case) (Judge's penciled note "given in substance")

Request No. 6

The Court has directed a verdict of not guilty on fourteen of the sixteen counts of the indictment. These counts are Numbers One, and Four through Sixteen, inclusive. The defendant stands acquitted on these counts, and you must disregard them completely, and confine your deliberations solely to counts Two and Three. (Judge's penciled note "given in substance")

Request No. 7

The crime of contempt has many elements. Each and every element must be proven by the prosecution beyond a reasonable doubt. (Judge's penciled note "give #7")

[fol. 32]

Request No. 8

One of the essential elements of the type of contempt involved here is that it be committed before a quorum of the body sitting. There is a conflict in the evidence before you as to whether the defendant appeared in Washington before a body supposed to be the full Committee on Un-American Activities or a body supposed to be a Subcommittee of that Committee.

If you find that the body before which the defendant appeared was supposed to be the Committee itself, as distinguished from a Subcommittee, you must find the defendant not guilty on all counts of the indictment before you, because it is undisputed that there was no quorum of the Committee at the time the defendant testified in Washington.

If you are left with any reasonable doubt as to whether the body before which defendant appeared in Washington was supposed to be the Committee or was supposed to be a Subcommittee, you must find the defendant not guilty on all counts of the indictment before you.

You cannot find that the Government has proved that a quorum of the body sitting heard defendant testify in Washington unless you find from the evidence before you that [fol. 33] the Government has proved each and every one of the following:

First: That the body before which defendant appeared was supposed to be a Subcommittee;

Second: That the full Committee on Un-American Activities authorized its Chairman to appoint Subcommittees consisting of three members of the Committee;

Third: If you find the Chairman was given such authority, that he was also given authority to appoint such a Subcommittee by mere telephone call;

Fourth: That on November 17, 1954, the day of defendant's testimony in Washington, the Chairman had appointed a Subcommittee consisting of Representatives Clardy, Scherer, and Walter; and

Fifth: That at all times pertinent to the counts of the indictment before you for consideration, either two or all

three of the three named Representatives were present as members of such a Subcommittee. (Judge's penciled note "Submit")

Request No. 9

Another essential element of the type of contempt in question here is that the defendant, as to the question specified in each count in the indictment before you, was clearly apprised that the Committee demanded his answer notwithstanding his objections. You cannot convict the defendant on any count unless you are satisfied as to that [fol. 34] count that he was apprised that the Committee demanded his answer notwithstanding his objections. (Judge's penciled note "cannot approach")

Quinn v. United States, 349 U.S. 155

Request No. 10

Still another essential element of the type of contempt involved here is that the defendant's refusal to answer any question was wilful or deliberate and intentional. You cannot convict the defendant on any count unless you find as to that count that his refusal to answer the question specified in that count was wilful or deliberate and intentional. (Judge's penciled note "give")

Quinn v. United States, 349 U.S. 155

Request No. 11

If you find as to any count that the defendant did not refuse to answer the question specified in that count, then you must acquit the defendant as to that count. (Judge's penciled note "give as to 4")

Request No. 12

Another element of the offense of contempt which the Government must prove is that the Committee called defendant to Washington to give information in aid of legislation. If you find that defendant was called to Washington in order to cite him for contempt rather than to obtain information in (Judge's penciled note "Refuse") aid of [fol. 35] legislation you must find him not guilty on all counts. If you are left with any reasonable doubt as to

which of these happened, you must find him not guilty on all counts.

United States v. Orman, 207 F. 2d 148 (C.C.A. 3, 1953)

United States v. Icardi, U.S.D.C.D.C. 1956

Request No. 13

If you find that the defendant was called before the Committee in Washington not in aid of legislation but to expose him as a former Communist, you must find him not guilty on all counts. (Judge's penciled note "Refuse")

Request No. 14

If you find from the proof that the defendant before declining to answer any of the questions specified in the counts before you made it clear that he was not going to answer that type of question because of his asserted rights under the First Amendment, you must acquit the defendant. (Judge's penciled note "Refuse")

United States v. Costello, 198 F. 2d 200 (C.C.A. 2, 1952), cert. den. 73 Sup. Ct. 166

Request No. 15

The credibility of a witness is a matter solely for you, the jury to decide. You must subject the testimony to the same scrutiny that you would subject any important conversation or act.

If you find that any witness has wilfully testified falsely [fol. 36] as to any material fact or has made a material misstatement with the intention of misleading you, you must disregard his or her testimony as to that fact, and you may disregard his or her entire testimony.

In this connection, the Court charges you that the term "material fact" includes facts bearing upon the credibility of the witness or the motive or the bias of the witness although not bearing directly upon the issues of this case. If you find (Judge's penciled note "Refused") that any

witness has wilfully falsified with respect to any fact going to his credibility, motive or bias, you may disregard all of his or her testimony. (Judge's penciled note "give in substance")

People v. Cortney, 94 N.Y. 490, 494 (1884)

United States v. Schindler, 10 Fed. 547 (C.C.N.Y. 1880)

Farkas v. United States, 2 F. 2d 644 (6th Cir. 1924)

Reg. v. Clover, 9 Cox Crim. Cas. 501

United States v. Remington, U.S.D.C., S.D.N.Y.

Request No. 16

In determining the credibility and the weight to be given to the testimony of witnesses, the prosecution is to be considered as any other party and its witnesses like any other witnesses. Neither more nor less weight or credence is to be given the testimony of any witness because he or she was called by the Government than if he or she had been called by the defendant. (Judge's penciled note "Refuse as unapplicable")

(As charged in *U.S. v. Remington*, U.S.D.C.S.D.N.Y.)

[fol. 37]

Request No. 17

Statements of counsel addressed to the Court with respect to any motions or objections to the admission of evidence are to be disregarded by you. And if any answer of a witness has been excluded or stricken from the record, you are to disregard the question and the answer entirely, for you may only consider matters admitted in evidence. (Judge's penciled note "given in substance")

United States v. Remington, S.D.N.Y. (1st case)

Request No. 18

Where the facts proven to your satisfaction by the prosecution are susceptible of two inferences, one pointing to innocence and the other pointing to guilt, it is your duty to adopt the inference pointing to innocence, even though

the inference pointing to guilt may be equally weighty.
(Judge's penciled note "Refuse 18")

Bechner v. United States, 5 F. 2d 45 (2nd Cir. 1924)
United States v. Remington, S.D.N.Y. (1st Case)

Request No. 19

Each of you must reach your own personal conclusion based upon the evidence in this case. While it is the duty of each juror to confer with his fellows and to compare his views with them, no juror against his individual judgment should consent to the conclusions reached by other jurors, whether the other jurors represent a majority or a minority [fol. 38] of the jury. Each juror, having in mind his duties and responsibilities, should have his own mind convinced beyond a reasonable doubt before he conscientiously consents to a verdict of guilty, and no one of you may surrender your conviction of the guilt or innocence of the defendant or of the reasonable doubt of guilt merely in order to prevent a disagreement.

United States v. Reid, 210 Fed. 486 (D. Del. 1913) .

United States v. Kenney, 90 Fed. 257 (D. Del.)

Stewart v. United States, 300 Fed. 769 (C.C.A. 8)

United States v. Samuel Dunkel & Co., 173 F. 2d 506
(C.C.A. 2)

United States v. Remington, S.D.N.Y. (1st case)
(Judge's penciled note "Deny given in part")

Respectfully submitted,

Joseph H. Freehill, Counsel for Defendant, 1701 K
Street, N. W., Washington 6, D. C.

IN UNITED STATES DISTRICT COURT

VERDICT—May 31, 1956

On this 31st day of May 1956 came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited May 29, 1956; whereupon the said jury after hearing further of the evidence and instructions of the Court, alternate juror Mrs. Daisy E. Spears is discharged from [fol. 39] further consideration in this case. The jury retires to consider their verdict.

The jury returns into Court and upon their oath say that the defendant is guilty on counts two, three and four; and by direction of the Court the jury finds the defendant not guilty on counts 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 & 16 of the indictment.

The case is referred to the Probation Officer of the Court, and the defendant is permitted by the Court to remain on his same bond until sentencing, set for June 11, 1956 at 1:30 p. m.

By direction of A. Sherman Christenson, Presiding Judge, Criminal Court #6.

IN UNITED STATES DISTRICT COURT

JUDGMENT OF CONVICTION WITH EXECUTION OF SENTENCE
STAYED—June 14, 1956

On this 11th day of June, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Joseph A. Fanelli, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Section 192, Title 2, U.S. Code

[fol. 40] as charged in Counts Two, Three and Four and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced,

and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Thirty (30) days and pay a fine of Five Hundred (\$500.00) Dollars on Count Two; Thirty (30) days and pay a fine of Five Hundred (\$500.00) Dollars on Count Three; Thirty (30) days and pay a fine of Five Hundred (\$500.00) Dollars on Count Four; said sentences on Counts Two, Three and Four to run concurrently.

It Is Adjudged that the execution of this sentence be and is hereby stayed pending the disposition of the appeal of this case on condition that the appeal is duly perfected by the defendant within the time provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

A. Sherman Christenson, United States District Judge.

[fol. 41]

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**Before: The Honorable A. Sherman Christenson, United
States District Judge for the District of Utah.**

Criminal Action No. 1230-54

THE UNITED STATES OF AMERICA, Plaintiff,

VS.

NORTON ANTHONY RUSSELL, Defendant.

Washington, D. C.

**Reporter's Transcript of Proceedings
—May 24, 25, 28, 29 & 31, 1956**

APPEARANCES:

**For the Plaintiff: William Hitz, Assistant United States
Attorney, Room 3400 United States Court House, Wash-
ington, D. C.**

**For the Defendant: Joseph A. Fanelli, Esq., Joseph H.
Freehill, Esq., and J. H. Krug, Esq., 1701 "K" Street,
Northwest, Washington 6, D. C.**

[fol. 42]

**United States Courthouse
Washington, D. C.
Thursday, May 24, 1956
10:00 a.m.**

The Clerk: The case of Norton Anthony Russell.

Mr. Hitz: The Government is ready.

Mr. Fanelli: The defense is ready, your Honor.

The Court: All right. You may proceed.

Mr. Hitz: Good morning. My name is William Hitz. I am an Assistant United States Attorney presenting this case; United States Attorney, not Department of Justice.

Mr. Fanelli: Your Honor, my name is Mr. Fanelli. I am counsel for the defendant, Mr. Russell. This is my co-counsel, Mr. Krug, your Honor.

• • • • •

COLLOQUY

Mr. Fanelli: Your Honor, it is our position that where the Government is going to introduce evidence on the question of pertinency, so that it cannot be gathered merely from the question and the answer, that in that situation pertinency is a question of fact for the jury, as are other questions of fact in the case.

• • • • •

Mr. Hitz: We feel that the jury should not hear the testimony.

• • • • •

[fol. 43] The Court: Well, I believe this, gentlemen: That I suppose even with consent it's the responsibility of the Court to run the case as it thinks it ought to be run. I believe in the first instance the matters going to pertinency should be tried to the Court. If it develops from that evidence that there are factual problems to be resolved which could, under the defendant's contention, properly be submitted to a jury, if the Court, upon consideration, adopts that view, it's not too late then to present the matter to the jury after that has been ascertained—the same as we do on the question of voluntariness of confessions, for instance.

• • • • •

The Court: So that we will proceed on that theory. And then after we take the evidence out of the presence of the jury, if it develops that the defendant is right, first, that there is a factual question to resolve and, second, that the law requires me to submit that factual question, we will put the evidence in in the presence of the jury.

• • • • •

Mr. Hitz: May I at this time read the names of the persons who were named to comprise the Un-American Activities Committee, your Honor, from Exhibit No. 2?

The Court: Yes.

Mr. Hitz: Harold H. Velde, of Illinois, Bernard W. (Pat) Kearney, of New York, Donald L. Jackson, of California, [fol. 44] Kit Clardy, of Michigan, Gordon H. Scherer, of Ohio, Francis E. Walter, of Pennsylvania, Morgan M. Moulder, of Missouri, Clyde Doyle, of California, and James B. Frazier, Jr., of Tennessee.

Will you call Mr. Tavenner, please?

FRANK S. TAVENNER called to testify as a witness in behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hitz:

Q. Mr. Tavenner, will you give your full name please?

A. Frank S. Tavenner, Jr., T-a-v-e-n-n-e-r.

Q. And your occupation, Mr. Tavenner?

A. Attorney.

Q. Are you Counsel for the House Un-American Activities Committee, sir?

A. Yes, sir, I am.

Q. How long have you been?

A. Since May the 1st, 1949.

Q. Did you attend a hearing on November 17, 1954, of a Sub-Committee of that Committee at which Mr. Norton Anthony Russell appeared?

A. Yes, sir, I did.

Q. Where did that take place?

A. In the Caucus Room of the Old House Office Building in Washington, D. C.

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The Court: The record may show that the jurors have withdrawn from the courtroom, the defendant, of course,

[fol. 45] continues to be present with Counsel. You may proceed.

Mr. Hitz: Thank you, your Honor.

Mr. Fanelli: We understand, your Honor, that the evidence about to be offered is offered only on the question of pertinency, is that correct?

Mr. Hitz: That's correct.

Would you mark this as Government's for identification No. 3?

(Government's Exhibit No. 3, Witness Tavenner, was thereupon marked for identification.)

Mr. Hitz: And for the record, this is a Government print of a document entitled "Investigation of Communist Activities in the Dayton, Ohio Area—Part 1".

The Clerk: Government's Exhibit 3 for identification.

Mr. Hitz: Might I pass a copy of this to the Court, please? (Handing to Court.) And there will be certain passages indicated by me from this document. We do not offer all of it. We offer—

I think before I make an offer of this I will ask Mr. Tavenner one or two questions, your Honor.

The Court: Very well.

By Mr. Hitz:

Q. Mr. Tavenner, how many times did Mr. Russell appear before the Un-American Activities Committee?

A. He appeared on two occasions.

Q. You have mentioned the occasion of November 17, [fol. 46] 1954. What is the other occasion?

A. The other occasion was September 15, 1954.

Q. Where was that September appearance?

A. It was in Dayton, Ohio.

Q. Now, would you tell me whether Mr. Russell's appearance before the Committee in November, 1954, the matter that we are inquiring into in this criminal trial, related to any particular investigation that had been undertaken and announced by the Committee?

A. Yes, sir. It pertained to the investigation that the

Committee had, for some months, been undergoing, and in the vicinity of Dayton, Ohio.

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By Mr. Hitz:

Q. Mr. Tavenner, now will you go to the question I asked you a few moments ago, and that is, what particular subject, if any, was the Committee engaged in inquiring when it called Mr. Russell on November 17, 1954?

Mr. Fanelli: We will object to this question. There's been no showing your Honor, that this witness is qualified to say what the Committee had in mind. He was not a member of the Committee. He was its Counsel. He can state what he thought he had in mind, but that wouldn't be relevant.

By Mr. Hitz:

Q. Do you know what the purpose was, sir?

A. Yes, sir, I do.

The Court: I take it the objection has been withdrawn, then?

Mr. Fanelli: Yes.

By Mr. Hitz:

Q. You do know what the purpose is?

A. Yes, sir.

[fol. 47] Q. Was it announced?

A. Yes.

Q. Did you hear it announced?

A. Yes, sir.

Q. Will you tell us what it is?

Mr. Fanelli: Your Honor, I will object to this as not the best evidence, if it was announced sub silentio. This is one of the reasons we moved for subpoenas at the beginning of this hearing. If it was announced and publicly available to us, I will withdraw my objection, but if it was announced in the corner of a room somewhere, and they have objected to our subpoena to find out what it was

before this trial got under way, I will object to this question. We don't need his testimony if it was publicly announced, anyway, your Honor, and I object on this ground.

By Mr. Hitz:

Q. You say you heard it announced?

A. Yes, sir.

Q. Where was it announced?

A. It was announced in the hearing room in Dayton, Ohio.

Q. On what day, sir?

A. On the 13th day of September, 1954.

Q. All right, sir. Will you tell us what it was announced that the particular purpose of the Committee was in this investigation?

A. Well, it was announced more in the nature of a general statement of the purposes of the hearing, in that it was to relate to Communist Party activities in the labor movement in industry, in educational institutions. That was the general subject of the announcement. It dealt, the [fol. 48] purpose actually emphasized particularly the strike at the, at the Univis Lens Corporation.

Q. Spell that for the record, please.

A. U-n-i-v-i-s, Univis Lens, L-e-n-s, Corporation, in 1948, and the part the Communist Party played in that strike; Communist Party infiltration into other concerns in industry; related to the investigation that the Committee had already begun back in February of 1953 in the field of education. It related to the leadership in the United Electrical, Radio and Machine Workers of America in the particular area from which the witnesses were called.

I think that summarizes the purpose of the hearing.

Mr. Fanelli: Your Honor, I move to strike all of this last answer on the grounds that, first, it's not the best evidence—if it was announced, we ought to have an exact print of it—and, secondly, that it's hearsay in the sense that we are deprived of an ample amount of cross-examination. We can cross-examine Mr. Tavenner only on what he heard, whereas we do not have present whoever it was

that announced for cross-examination, and on those grounds I move that this answer be stricken.

The Court: Was there a record made, transcript made of the proceedings?

Mr. Hitz: Yes, there was.

Q. Was there, Mr. Tavenner?

A. Yes, sir.

[fol. 49] The Court: And is that transcript available?

Mr. Hitz: It is available.

By Mr. Hitz:

Q. Who made the announcement, sir?

A. Mr. Scherer, Gordon H. Scherer, who was Chairman of the Sub-Committee.

Q. I see. And will you tell us where that may be found, that announcement?

A. It may be found in Part 1 of the Investigation of Communist Activities in the Dayton, Ohio area, beginning at Page 6799.

Q. And that is Government 3 for identification, is that not correct, sir?

A. Yes, sir, I so understood.

The Court: And your statement was based upon this announcement as it appears in the official report?

The Witness: The general purpose of the, as I outlined, was based on the exact, on the exact language of this report. But insofar as it related to other things, more in particular, in detail, they were matters that occurred during the course of the hearings and were not announced publicly ahead of time.

The Court: Well, I am wondering if the portion of his answer may not have been responsive to the point of your question. An objection separately stated to it might be good. I am going to deny the motion to strike, since it's too general, and since I understand that there is no objection to that portion dealt with in an official report.

Mr. Fanelli: He hasn't offered it yet, your Honor. I [fol. 50] don't believe I will have one. I will be candid. But he hasn't offered it yet.

The Court: I see. Well—

Mr. Fanelli: I move to strike that part of his answer which is not related to what was announced and published in this.

The Court: Motion is granted.

By Mr. Hitz:

Q. Mr. Tavenner, I wonder if you would be good enough to tell us whether Page 6799, beginning near the top: "Mr. Scherer: The Committee will be in session," etc., is that portion of the announcement by the Committee or the Sub-Committee of its purpose in this particular investigation about which you have testified.

A. Yes, sir.

Q. Is that substantially accurate, as you recall it, as it's printed up there in Government No. 3—

A. Yes, sir.

Q. (Continuing) —for identification?

A. Yes, sir.

OFFER IN EVIDENCE

Mr. Hitz: Your Honor, I offer Government No. 3, pages 6799, 6800, 6801, 6802, down to the sentence that begins about seven lines from the bottom, "If there is nothing further . . ." down to that part. And I would like permission for the Court, for the witness to read those pages.

Mr. Fanelli: Your Honor, I think I will—

Excuse me. Were you finished?

Mr. Hitz: Yes.

Mr. Fanelli: I think I will object to this, your Honor, on the ground that it's not the best evidence of what Mr. [fol. 51] Scherer said, and it deprives us of cross-examination of Mr. Scherer. And this is particularly important, your Honor, in the light of your Honor's ruling quashing those subpoenas this morning.

The Court: Well, you don't object on the grounds that this isn't a proper form of proof as to what was said?

Mr. Fanelli: I am waiving any objection along that line, yes, sir.

The Court: All right; I will overrule the objection and receive that portion of the exhibit indicated being offered.

Mr. Hitz: Thank you, your Honor.

(Government's Exhibit No. 3, witness Tavenner, was thereupon received in evidence.)

By Mr. Hitz:

Q. Now, Mr. Tavenner, in view of your statement that some of what you stated to be the announced purpose of this investigation was not a public announcement, I wonder if you'd be good enough to read what was the public announcement, beginning with "Mr. Scherer: The Committee will be in session." Read that for the record and the Court.

A. Yes, sir. (Reading.)

"Mr. Scherer: The committee will be in session. Let the record show that the Honorable Harold H. Velde, chairman of the House Committee on Un-American Activities, has appointed a subcommittee for the purpose of conducting these hearings at Dayton, Ohio, consisting of the Honorable Kit Clardy, of Michigan, the Honorable Francis E. Walter, of Pennsylvania, and Gordon Scherer as chairman.

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[fol. 52] "Before proceeding with the hearing of testimony, it seems proper and might be helpful if we restated the purpose and duties of the House Committee on Un-American Activities, and make a few pertinent observations. The committee is charged by law with investigating the extent, character, and object of un-American activities in the United States. It is charged with investigating the diffusion in the United States of subversive and un-American propaganda that is instigated from foreign countries or is of a domestic origin, and attacks the principles and form of government as guaranteed by our Constitution.

"The reason such duties are placed upon the committee is to aid the Congress in determining whether or not remedial legislation is necessary with respect to these activities, and to help enlighten the American people with reference thereto.

"Since the evidence is now conclusive that we are engaged in a cold war with Russia and Communist China,

and that they stand as a clear and present danger to the safety and security of this Nation and the free world, the committee has been primarily devoting its time and energy to investigating and revealing the Communist conspiracy in this country.

"There should be no doubt that the primary issue confronting the American people is the security of the Nation.

"Congress in the last 3 years has authorized the staggering and almost unbelievable sum of \$160 billion for those [fol. 53] programs which we hope will guarantee that security. We are daily drafting boys for service in 37 countries of the world. Almost every newspaper headline deals with some form of the Communist menace. Practically all of our efforts have been directed toward preventing further expansion of Communist domination. At times we have shrunk in terror of the Russian bear without; we have on too many occasions coddled and nursed its offspring within. One Communist agent within our borders is more dangerous to our security than 10,000 enemy troops poised on the other side of the Iron Curtain.

"Sometimes we forget that the Kremlin has succeeded in taking 600 million people behind the Iron Curtain by a new method of warfare, that of boring from within.

"This committee for many years has been revealing to the American people the nature of the Communist conspiracy, and how it cleverly and subtly operates. As a result, Mr. Average American now knows the Communist conspiracy provides for the infiltration of every phase and field of American life. The Communist objectives are to create strife between labor and management, and within the labor group itself to cause people to be suspicious and distrustful of the Government and law-enforcement agencies thereof; to make them dissatisfied with the American way of life, particularly its economic system; to create doubts concerning their religious teachings; to set class against class, minorities against majorities, and even minorities against minorities when it suits their purpose.

"Mr. Average American has learned that the Communist program is a process of attempting to soften and weaken the American people and its institutions so that when the

time comes to move in the task will be much easier to accomplish. This is not theory.

"As I have said, the Soviet Union has taken behind the Iron Curtain 600 million people since 1933 by the use of these methods. Of course, such a conspiracy can act only through individuals. These individuals must promote the Communist program, however, in the various American institutions with which they are identified, since they cannot act in a vacuum. We find them active in the labor movement, in industry, in government, in educational institutions, in the entertainment field, and I am sorry to say in some instances in the field of religion. The committee is not investigating these institutions.

"As an example, this committee as such has no interest in the labor movement or in labor's problems with management, or in labor's inner conflicts. It has no interest as such in the personnel that teach in our schools or our colleges, nor in the curriculum or type of textbooks used therein. These are matters that lie solely within the province of the administrators of these institutions and organizations.

"We are engaged, however, in throwing light upon the nefarious and subtle activities of those individuals who are [fol. 55] promoting the Communist conspiracy so that, as I have stated, the average American may know them and recognize the activities and propaganda of a foreign power when he comes in contact with it, either in the shop, in the school, in the church, or in any other phase of everyday life.

"Now, some say we are exaggerating the Communist danger. However, perhaps the highest authority, J. Edgar Hoover, the head of the Federal Bureau of Investigation, said when testifying under oath before the Appropriations Committee of this 83rd Congress, that Communists are infiltrating every field of American activity, and espionage rings are working more intensely than ever before in the history of the United States. There are those who still argue, and no doubt you will hear it said by witnesses at this hearing, that Communism is a political belief, and therefore we have no right to inquire into the Communist

Party membership of any individual. For many years the Committee on Un-American Activities has maintained that the Communist Party is not a political party as we know political parties in the United States, but that it is a criminal conspiracy, and an agency of a foreign power. We are happy to say that just last month the present Congress has now found and stated as a matter of law that the Communist Party is and has been such a conspiracy. No witness or other person can now properly contend otherwise."

[fol. 56] A. (Continuing) "While we are talking about witnesses, perhaps our attention should be directed to those persons who have vital and extensive information concerning the operation of the Communist conspiracy, and who invoke the fifth amendment, those who refuse to testify on the grounds that to do so might incriminate them. The committee has always felt that in the great majority of cases witnesses have improperly and in bad faith hidden behind the fifth amendment.

"The Committee on Un-American Activities has long recommended the passage of an immunity law, and we are more than pleased that this Congress shortly before it adjourned passed this law.

"Now, for some time there has been a rather intense controversy in the Yellow Springs area. At times there has been more heat than light shed on the issues which have divided the community. It must be clearly understood that the Committee on Un-American Activities takes no side whatsoever in this controversy. It does, however, emphatically disapprove and deplore its being injected into that controversy by parties involved therein. At no time has anyone except the representatives of the press, when they have made inquiries, been authorized to make any statements concerning these hearings and the events leading up thereto. I might say that the press has been accurate and objective in its reporting of the committee's position.

[fol. 57] "The committee did not initially instigate the investigation which resulted in these hearings. Over a considerable period of time the committee received complaints and requests for an investigation from the Dayton-Yellow Springs area. The committee, in accordance with its rules attempted to check these complaints quietly. As a result of our staff's investigation and report, the full committee ordered these hearings. They are not being held because individuals or organizations requested them, but as I have stated, as a result of the investigations of the staff initiated by the complaints.

.

"Mr. Walter, do you have a comment to make before we proceed with the hearing?

"Mr. Walter: None, except anybody who testifies before this committee will be accorded the full protection of all of the laws of the United States, and by all of the agencies of the Government.

"Mr. Scherer: Mr. Clardy?

"Mr. Clardy: I think we perhaps might add one thing, Mr. Chairman, and that is that if during the course of the investigation anyone is named by a witness as a member of the Communist Party, we will afford him an opportunity at a suitable time for him to appear and say what he may wish to say in his own behalf.

"Mr. Scherer: That is in accordance with the rules of the committee. You are referring to that rule which re-[fol. 58] quires us to notify anybody who has been named adversely in such testimony, and then he is given, as you say, an opportunity to appear before the committee and explain or deny the adverse testimony.

"If there is nothing further, we will proceed with the first witness."

Q. Thank you, sir. Who was the witness that followed?

A. The witness that followed was Mr. Strunk, Mr. Arthur Paul Strunk, S-t-r-u-n-k.

Mr. Hitz: Your Honor, we next offer from Government No. 3 that part of the testimony of Mr. Strunk from its beginning on 6803 through 6804, and down to approximately

a third from the bottom of 6805, where it states "Mr. Strunk. Correct."

The purpose of this offer is further to prove the pertinency of the questions that were asked of Mr. Russell with respect to that. It is the position of the Government that this particular committee may call anyone available to it as a witness to inquire about matters that have to do with its resolution, that is, subversive activities, no matter who that person may be, because it has been held that personnel is part of the subject, and the numbers of persons that are engaged in that activity or that know about it would be possible sources of information. In spite of that position, that we do that, we also feel that we are entitled, nevertheless, to offer proof of special pertinency. And it is in offer of proof of special pertinency of this particular witness's possible testimony that we make this offer of this testimony of Mr. Strunk.

[fol. 59] It will, of course, be noted that Mr. Strunk's testimony here was given to this committee before either of the two appearances before the committee of the Defendant Russell.

• • • • •
By Mr. Hitz:

Q. Mr. Tavenner, would you be good enough to read Page 6803, the testimony of Paul Strunk, and I will stop you when we get to 6805.

• • • • •
A. (Reading.) "Mr. Scherer: Will you just take the seat over there opposite the microphone? Before you sit down, will you raise your right hand and be sworn?"

"You do solemnly swear that the testimony that you are about to give at this hearing, shall be the truth, the whole truth, and nothing but the truth, so help you God?"

"Mr. Strunk: I do.

"Mr. Scherer: Will you be seated please?"

"Mr. Tavenner: What is your name, please, sir?"

"Mr. Strunk: Arthur Paul Strunk.

"Mr. Tavenner: When and where were you born, Mr. Strunk?

"Mr. Strunk: Germany.

"Mr. Tavenner: On what date?

"Mr. Strunk: March 17, 1896.

[fol. 60] "Mr. Tavenner: When did you come to this country?

"Mr. Strunk: December 1923.

"Mr. Tavenner: Are you now a naturalized American citizen?

"Mr. Strunk: I am.

"Mr. Tavenner: When were you naturalized?

"Mr. Strunk: I think in 1931.

"Mr. Tavenner: Will you give the committee, please, a brief statement of what your educational training has been?

"Mr. Strunk: Eight years public school, and two years business school, connected with my trade. I was learning.

"Mr. Tavenner: Was any part of that educational training in this country?

"Mr. Strunk: No.

"Mr. Tavenner: Will you tell the committee, please, briefly, what your record of employment has been?

"Mr. Strunk: My first place of employment was the Singer Sewing Machine in Elizabethport, N. J. The second place was a place in, a cutlery place, in Maplewood, N. J. The next one, Central Railroad of New Jersey. Then the Kresge Department Store, New Jersey. Christie & Smith, a furniture store in Newark, N. J. That is all I remember.

"Mr. Tavenner: Where do you now reside?

"Mr. Strunk: Dayton, Ohio.

"Mr. Tavenner: How long have you lived in Dayton?

"Mr. Strunk: Since 1936.

[fol. 61] "Mr. Tavenner: What is your present occupation?

"Mr. Strunk: I work in the service department for May & Co., furniture store, in Dayton.

"Mr. Tavenner: What year was it in which you came to Dayton?

"Mr. Strunk: 1936.

"Mr. Tavenner: Mr. Strunk, during the period that you have been in Dayton, have you had an opportunity to observe at first hand the workings of the Communist Party in this area?

"Mr. Strunk: I did.

"Mr. Tavenner: Will you explain to the committee how that opportunity was afforded you?

"Mr. Strunk: I was living at 1012½ Brown Street, and the F.B.I. asked me to be an interpreter after Pearl Harbor. I was an interpreter for three years for the F.B.I. Before that time, I rented rooms out, and I found Communist Party literature in one room. I reported the same to the F.B.I. The F.B.I. told me to watch out and get close and try to become a member of the Communist Party. In 1944, I had enough confidence, I was handed an application to become a member of the Communist Party.

"Mr. Tavenner: You became then a member of the Communist Party at the request of the Federal Bureau of Investigation?

"Mr. Strunk: At the request of the F.B.I.

"Mr. Tavenner: And not because of any conviction on your part?

"Mr. Strunk: Definitely not.

[fol. 62] "Mr. Tavenner: Regarding the ideology of the Communist Party.

"Mr. Strunk: The F.B.I. asked me if I would join the Communist Party during the time I was a translator. And in 1944 I became a member of the Communist Party by request of the F.B.I.

"Mr. Tavenner: How long did you remain a member of the Communist Party?

"Mr. Strunk: Until it was exposed at the Hupman trial in Dayton, Ohio.

"Mr. Tavenner: What was that date, approximately?

"Mr. Strunk: I think I got out of the party in 1952.

"Mr. Tavenner: Now, will you tell the committee, please, how you became a member of the Communist Party?

"Mr. Strunk: I became more friendly to this man who had a room in my house, and my way was to get more friendly to him and to get more trust and to become a member of the Communist Party.

"Mr. Tavenner: What was that man's name?

"Mr. Strunk: This man had two names, like every member of the Communist Political Association, we called it at that time. He had two names, his own name and a party name. His name was Moore and Murphy.

"Mr. Tavenner: Do you recall now which of those names was his party name?

"Mr. Strunk: I don't recall that.

"Mr. Tavenner: No, after you became a representative of the Federal Bureau of Investigation in this undertaking, [fol. 63] did you make reports to the Federal Bureau of Investigation of the knowledge which you acquired?

"Mr. Strunk: I did. That was my duty.

"Mr. Tavenner: Over how long a period of time did you do that?

"Mr. Strunk: Eight years.

"Mr. Tavenner: How frequently did you make reports?

"Mr. Strunk: Especially after every meeting.

"Mr. Tavenner: Now, let us go back to the time that you cultivated the acquaintanceship of Mr. Moore or Mr. Murphy, and will you tell the committee what resulted from that, please?

"Mr. Strunk: I became a good friend, and I got confidence, and finally I was handed a piece of paper, an application, to join the Communist Party. That was the beginning.

"Mr. Clardy: About when was that?

"Mr. Strunk: It could have been the end of 1943. I became a member in 1944.

"Mr. Tavenner: Now, I would like for you to tell us at this point, please, what you found to be the organizational setup of the Communist Party after you became a member.

"Mr. Strunk: In 1944, the Communist Party was called the Communist Political Association. During the time Browder was thrown out of the Communist Party, the Communist Party was again called the Communist Party of the United States.

"Mr. Tavenner: Well, did you find that the Communist Party in this locality was divided up into groups or cells, [fol. 64] or branches, when you first became a member?

"Mr. Strunk: When I became a member, there was one Dayton section. After the change to Communist Party of Ohio, it still was one section. Later, I don't remember exactly what year, the Dayton Communist Party was divided into five groups, city group. And after 1950, we had a Taft-Hartley group. One group was the professional group; one group the Frigidaire group; one group the amalgamated group, one group the city group. And after 1950, we had a Taft-Hartley group.

"Mr. Tavenner: Now, in the course of your testimony, I will want to ask you particularly about the Taft-Hartley group, but we will not go into that at the moment.

"Mr. Clardy: We have run into that before, haven't we?

"Mr. Tavenner: I think we have heard of it.

"Now, Mr. Strunk, will you tell us whether or not these five groups of the Communist Party here were responsible to some other higher authority in the Community Party?

"Mr. Strunk: Cleveland, Ohio, the State office.

"Mr. Tavenner: They worked under the State office?

"Mr. Strunk: Correct.

"Mr. Tavenner: Would it be correct to say that these five groups of the Communist Party in Dayton constituted the Dayton section of the Communist Party?

"Mr. Strunk: Correct; Dayton section.

[fol. 65] "Mr. Tavenner: Can you give us the names at this time of the leaders of the Communist Party, the State organization of the Communist Party, that you became acquainted with during your seven or eight years?

"Mr. Strunk: You mean the State, the Cleveland office?

"Mr. Tavenner: Yes. First of all, did it have its headquarters in Cleveland?

"Mr. Strunk: Correct."

Mr. Hitz: Thank you.

Your Honor, we next offer a portion of Page 6813, beginning shortly below the middle of the page, "Mr. Tavenner: Will you tell the committee . . ." and going through Mr. Strunk's answer to that question.

• • • • •

The Court: Received.

By Mr. Hitz:

Q. Will you read it, sir?

A. (Reading.) "Mr. Tavenner: Will you tell the committee as far as you can what the Communist Party was seeking to accomplish in this community? What was their main objective?

"Mr. Strunk: The main objective was infiltration in organized labor, all different kinds of organizations, if possible; support strikes; build up strikes; and infiltrating unions; and get the power of the unions."

Mr. Hitz: Our next offer is on Page 6836 and 7, your Honor. It begins on 6836, with that portion of Mr. Strunk's last statement at the bottom of the page, which begins "Norton Anthony Russell," three lines from the bottom, [fol. 66] and it continues until shortly above the middle of 6837, through Mr. Strunk saying "Not personally."

• • • • •
The Court: Received.

By Mr. Hitz:

Q. Will you read it, sir?

A. (Reading.) "Norton Anthony Russell—"

Q. Now, this is Mr. Strunk speaking, is it?

A. Yes, sir.

• • • • •
By Mr. Hitz:

Q. All right, Mr. Tavenner, will you continue to read now "Norton Anthony Russell . . ." ?

A. (Reading.) "Norton Anthony Russell. He lives on President Street, Yellow Springs, Ohio. During the time when Anthony Russell used to live in Greenmont Village, we had several meetings in his house, and he was a member of the Communist Party, belonged to the professional group, as far as I remember.

"Mr. Tavenner: When you say that you had several meetings in his house, what kind of meetings were you referring to?

"Mr. Strunk: Communist Party meetings in his house.

"Mr. Walter: Approximately when was that, Mr. Strunk?

"Mr. Strunk: This is several years ago.

"Mr. Walter: Was it after the attack that was made on South Korea?

[fol. 67] "Mr. Strunk: Before.

"Mr. Walter: Before.

"Mr. Strunk: It was before.

"Mr. Walter: Before June 1950?

"Mr. Strunk: Yes, it was before. Anthony Russell moved to Yellow Springs, working for Vernay Laboratories in Yellow Springs. He wasn't very active since he moved over to Yellow Springs. He attended once a Communist Party picnic in Bryan State Park. That is the last time I heard about Anthony Russell. He did pay me dues years before when he was a member of the Communist Party.

"Mr. Tavenner: Did you receive any dues from him after he moved to Yellow Springs?

"Mr. Strunk: Not personally."

Q. Thank you, sir. Now, would you drop down in the page to the place where Mr. Strunk refers to Herbert Reed, and then spells the name out, and read that paragraph and the next one?

Mr. Hitz: I'm sorry. I will make the offer first. Excuse me, your Honor.

Do you have it, Mr. Fanelli?

Mr. Fanelli: Yes, I have it. No objection. Go ahead.

Mr. Hitz: Thank you.

The Court: Received. Those are just two paragraphs?

Mr. Hitz: Yes, your Honor.

[fol. 68] The Court: All right.

A. Mr. Strunk testifying states: (Reading) "Herbert Reed, H-e-r-b-e-r-t R-e-e-d. He used to be in Dayton, in the beginning, when I joined the Communist Party. He was an officer in the Communist Party.

"The time, I don't know exactly what year. He left later, and when I became a Communist, he was not in Dayton any more, but I knew him."

Mr. Hitz: Thank you, sir. Your Honor, that concludes the testimony of Mr. Strunk that we believe is important in this case.

Mr. Hitz: (Continuing) I'd like to offer Page 6842, all of the testimony on that page of Mr. Wornstaff, W-o-r-n-s-t-a-f-f, and the first three lines of the next page, 6843. And in addition to that, 6852, five lines from the bottom, where Mr. Scherer says, "Are there any local U. E. unions in Dayton today?" All of 6853, 4, and that much of 6855 as goes about twenty lines from the bottom, when Mr. Wornstaff says, "Walter Lohman."

The Court: Any objections, Mr. Fanelli?

Mr. Fanelli: No objections, your Honor.

The Court: Received.

[fol. 69] Mr. Fanelli: Understanding this goes only to pertinency, and is not offered for any other purpose.

Mr. Hitz: That's correct.

The Court: I understand that is correct.

(The following is the portion of material contained on pages 6842 and 6843 as outlined by Mr. Hitz:)

"Mr. Tavenner: What is your name, please?

"Mr. Wornstaff: Leothar Wornstaff, L-e-o-t-h-a-r W-o-r-n-s-t-a-f-f.

"Mr. Tavenner: Are you familiarly known as Oakie?

"Mr. Wornstaff: That is right.

"Mr. Tavenner: When and where were you born, Mr. Wornstaff?

"Mr. Wornstaff: Springfield, Ohio, February 1, 1906.

"Mr. Tavenner: And—

"Mr. Clardy: They call you Oakie?

"Mr. Tavenner: That is right. Do you now reside in Dayton?

"Mr. Wornstaff: That is right.

"Mr. Tavenner: How long have you lived in Dayton?

"Mr. Wornstaff: Since 1932.

"Mr. Tavenner: What is your occupation?

"Mr. Wornstaff: I am president of Local 768, IUE-CIO.

"Mr. Tavenner: How long have you been president of [fol. 70] that local?

"Mr. Wornstaff: Since 1948.

"Mr. Tavenner: And—

"Mr. Clardy: May I suggest, counsel, that we have him make the distinction between the several unions so there will be no false impression in anybody's mind?

"Mr. Wornstaff: I was elected president of local 768 under UE-CIO, and in November, 1949, the UE was thrown out of the CIO, and then I retained my position as president of Local 768, IUE-CIO.

"Mr. Tavenner: I believe you engaged in a fight within your union to oust Communist influence and control of your union when it was in the UE?

"Mr. Wornstaff: We did.

"Mr. Tavenner: Isn't that true?

"Mr. Wornstaff: That is correct.

"Mr. Tavenner: In calling this witness, I want to make it plain there has been no intimation of any character that this witness was at any time sympathetic to communism. In fact, it is just for the contrary reason that we are calling him.

"Mr. Scherer: The record will so indicate.

"Mr. Clardy: That is why I interrupted and suggested what I did so as to make it abundantly clear that you are at the opposite pole from the Communist Party controlled union.

"Mr. Wornstaff: Thanks for the distinction.

[fol. 71] "Mr. Tavenner: Mr. Wornstaff, I want to make it clear also that the committee desires to avoid in any way interfering with the internal affairs of a labor union, or of interfering in any way in disputes or differences between labor and management. That is not the function or the field of this committee. But—

"Mr. Clardy: With the exception, counsel, of helping them rid themselves of the Communist influence.

"Mr. Tavenner: I said the word 'but' and expected to follow it. But this committee does feel that it has the responsibility of following Communist Party activities

wherever they may be found, and it is only in that respect that I wanted to call you with reference to certain activities that took place during the strike in which your union, the UE, was engaged in 1948. That is the Univis Lens strike.

"Now, at that time, you were president of that local, I believe!"

(The following is the portion of material contained on pages 6852, 6853, 6854 and 6855 as outlined by Mr. Hitz:)

"Mr. Scherer: Are there any local UE unions in Dayton today?"

"Mr. Wornstaff: Two.

"Mr. Tavenner: I would like to have the names of the manufacturing plants in which your local was organized back at that time, in 1948.

"Mr. Wornstaff: You want the names of all of the plants that are represented by UE now?"

[fol. 72] "Mr. Tavenner: All you represented in 1948, when the question of this strike arose. Can you give us that?"

"Mr. Wornstaff: There would be twenty of them.

"Mr. Tavenner: Give us those that you recall.

"Mr. Wornstaff: Air Temperature Division of the Chrysler Corp.; Buckeye Iron & Brass; Gondert-Linesch Co.; Berger Iron Co.; Ohio Box & Lumber Co.; Dayton Forge & Manufacturing Co.; Standard Register Co.; Vernay Laboratories, Yellow Springs, Ohio; National Foundry Co.

"Mr. Scherer: Pardon? Just a minute. What union do they have now?"

"Mr. Wornstaff: IUE-CIO.

"Mr. Scherer: When did UE lose out in Vernay?"

"Mr. Wornstaff: That was one of our first shops in 1950, the early part of 1950. There is a little story back of that. I don't know whether it would be fitting or not, but I would like to relate it for the matter of the record.

"Mr. Scherer: Go ahead.

"Mr. Wornstaff: We thought because Mr. Walter Lohman, who I understand is under indictment, he was then

chief steward at that shop. When we were seceding from the UE we felt we didn't have a chance in that shop, so we ignored the laboratory because we felt it was a lost cause. I was sitting at my desk one evening, at which time [fol. 73] Mr. Vernay called me long distance and asked me what we were going to do about his shop. I said, well, we felt the shop was lost, and we had all we could do to try to get the other 19 shops to get out of UE. We hadn't spent any time over there. He said, 'I want you to know that our employees are not Communist,' and he says, 'We don't want any part of UE.' He says, 'I would like to have you people come over and meet a committee of our workers and get them in IUE also.' He says, 'Could you come over this evening?'

"I had a meeting that particular evening. I told him I would be there in an hour's time. So when we went over there Mr. Vernay had five of his workers at his home, and he and the plant superintendent and the secretary-treasurer of the company were there also.

"So after he introduced us around, he says, 'Now, I am going to leave.' He says, 'You people can use my home. If you want anything to eat or drink, there is the icebox. When you get done with my residence, call me and I will return back.'

"So through his efforts, the following weekend—I think at that time Mr. Vernay had around 48 employees. There were 47 signed cards out of the 48 employees that came back to our office the following evening, at which time then we started proceedings to get his factory into the IUE. We felt it was a lost cause until he told us that his employees did not want any part of UE, and would we come [fol. 74] over and start a drive over there the same as we had in our other 19 factories.

"Mr. Scherer: Is Lohman still with Vernay Laboratories?

"Mr. Wornstaff: Yes, he is.

"Mr. Scherer: Does he belong to IUE?

"Mr. Wornstaff: No, sir.

"Mr. Scherer: What is his capacity over there?

"Mr. Wornstaff: He is a toolmaker or a machinist, one of the two.

"Mr. Tavenner: There is another person identified by Mr. Strunk, his name was Russell, Tony Russell. You may have heard that this morning.

"Mr. Wornstaff: I know him very well.

"Mr. Tavenner: Is he a member of your local?

"Mr. Wornstaff: No, Mr. Russell is in a supervisory capacity at Vernay Laboratories.

"Mr. Clardy: He didn't finish the list.

"Mr. Tavenner: That is right. Will you return now and give us the names of any additional manufacturing plants that you can recall with which your local had contracts in 1948?

"Mr. Wornstaff: In 1948?

"Mr. Tavenner: Yes.

"Mr. Wornstaff: Well, at that time we had the G. H. & R. Foundry. We had the Dayton Malleable Iron Co. We had the Univis Lens Co., up until which time, the end of the strike. We had the Brown & Blackmar Co.

[fol. 75] "Mr. Scherer: It may be difficult for the witness to remember all of them. Can't he give them to the staff at a later time and we can insert them in the record?

"Mr. Tavenner: I am amazed he can call them off that rapidly. I wanted to lay the foundation for the next question.

"Mr. Clardy: Has he gone as far as he can?

"Mr. Wornstaff: There are five or six more.

"Mr. Clardy: You remember all you can at the moment?

"Mr. Wornstaff: I would say yes.

"Mr. Tavenner: During the period of the war, I assume that many of those manufacturing plants were engaged in the performance of war contracts?

"Mr. Wornstaff: I couldn't answer that specifically because during the war I was not an officer of Local 768. I was an employee of Univis Lens Co.

"Mr. Tavenner: Did you become aware during the period of the strike that in addition to those Communist Party members who were officials of the international organization of the UE, and were sent in here, that persons having a purely functionary status in the Communist

Party were sent in to aid and direct these other members? Do you know anything about that?

"Mr. Wornstaff: No, I don't.

"Mr. Tavenner: I think that is all.

"Mr. Clardy: Maybe he doesn't quite understand your question.

[fol. 76] "Mr. Tavenner: My question was involved. Do you know whether any functionaries of the Communist Party who were not in any sense connected with labor organizations, such as Martin Chancey, for instance, Joe Brant, or Gus Hall, came into this area during the period of that strike and endeavored to exert an influence over it?

"Mr. Wornstaff: There were many people that came in. They were named this morning. And it seems like they always made their headquarters in our local because even the Progressive Party moved into our local. We had to bodily throw them out. We were paying their telephone bills, advertising bills, and everything else. So three of us laid off from work one day and bodily threw them out of our local union.

"Mr. Clardy: Did you have any trouble?

"Mr. Wornstaff: We had them outnumbered that particular day.

"Mr. Tavenner: I learned with a great deal of interest, too, this morning that your local union was defraying the expenses of the Communist Party by furnishing the ink and stationery, and mimeograph machine, and paying for the time of the operator for a period of years.

"Mr. Walter: It seemed to me that the two things were synonymous, your union and the Communist Party.

"Mr. Wornstaff: That is right. I will say it was a hot-bed for Dayton, Ohio.

[fol. 77] "Mr. Tavenner: Do you think the rank and file of your membership at that time would have stood for that if they had known it?

"Mr. Wornstaff: No; I don't think they would have.

"Mr. Tavenner: You are convinced they wouldn't stand for it now if they knew?

"Mr. Wornstaff: I am positive.

"Mr. Tavenner: I have no further questions, Mr. Chairman.

"Mr. Scherer: Mr. Clardy?"

"Mr. Clardy: Just continuing that last subject, didn't they—by 'they' I mean the members of your union—didn't they pretty effectively demonstrate what they thought of the Communist influence when they voted 5 to 1, with the other ratio you mentioned, to throw the Communists out and elect some of the rest of you?"

"Mr. Wornstaff: We had a more impressive vote than that."

"Mr. Clardy: What was that?"

"Mr. Wornstaff: The votes when we decided to leave UE and to go along with IUE; we had in the neighborhood of 1,400 members present at that meeting that evening. I think there were only around 3 or 4 people that voted against the resolution affiliating with IUE."

"Mr. Clardy: Wouldn't you say it would be fair for the committee to assume that in at least that percentage the rank and file of your union were anti-Communists and good loyal American citizens?"

"Mr. Wornstaff: Yes, sir."

[fol. 78] "Mr. Tavenner: Who was your opponent in the election?"

"Mr. Wornstaff: Walter Lohman."

"Mr. Tavenner: I have no further questions."

• • • • •

Mr. Fanelli: Well, there is a difficulty as to the second half of that. Your Honor, I take it that counsel is offering this at the present time to show that the procedure set forth in the statute was followed—which at least one case holds the Government is required to do. We are perfectly willing to stipulate that the procedure set forth in the statute for a citation of contempt in Section—what is it—192 was followed in that case. Maybe that—

Mr. Hitz: 194, Title 2.

Mr. Fanelli: 194. Maybe that will eliminate this offer at the present time.

Mr. Hitz: I will.

The Court: Do you accept the tendered stipulation?

Mr. Hitz: We accept the stipulation. We do accept that.

The Court: All right.

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OFFER IN EVIDENCE

Mr. Hitz: The Government next offers its Exhibit No. 5 for identification, which, as described in my list, is the annual report of the committee for 1954. We make an offer of the entire document, but wish to refer the Court only to certain portions at this time.

[fol. 79] Mr. Hitz: May the entire document be received, your Honor?

The Court: In the absence of objection, it may be received.

(Government's Exhibit No. 5, Witness Tavenner, was thereupon received in evidence.)

Mr. Hitz: I think at this point I don't need to form a question to Mr. Tavenner, but I'd like to ask the Court, please, to refer to Page 1, that portion called "Forward", and note that in Paragraph 2 it is stated as follows: "During the year 1954, the Committee on Un-American Activities held hearings in Albany, N. Y.; Chicago, Illinois; Dayton, Ohio," etc.

By Mr. Hitz:

Q. Mr. Tavenner, I wonder if you'd be good enough, with the Court's permission, to read the second full paragraph on Page 2, beginning "Early in 1954 . . ."

A. (Reading) "Early in 1954 the Attorney General of the United States advised the Congress that certain legislation was considered necessary to strengthen effectively the national security. Four of these recommendations by the Attorney General were embraced within those previously made by the committee. These were for capital punishment in instances of espionage committed in time of peace; immunity of certain witnesses appearing before duly authorized Federal bodies; for the admissibility of evidence secured by wiretapping or technical devices; and for legislation to break Communist control over

certain labor unions. The Congress in 1954 passed and the President signed into law three of these recommendations originally proposed by this committee and subsequently requested by the Attorney General. A law permitting the use of evidence secured by technical devices in cases involving espionage and matters relating to internal security passed the House but did not obtain approval in the Senate."

Mr. Hitz: Thank you, sir.

I would like to invite the Court's attention next to Page 7, that portion which is headed "Dayton, Ohio, Area," and particularly to the first sentence, which is: "Continuing the committee's investigation of Communist infiltration in basic industries throughout the United States, hearings were held in Dayton, Ohio, September 13, 14 and 15 of this year."

By Mr. Hitz:

Q. Mr. Tavenner, was September 15 the day when Mr. Russell made his appearance before the committee in Dayton, Ohio?

A. Yes, sir.

Q. Then did the committee return to Washington?

A. Yes, sir.

[fol. 81] Mr. Hitz: I would next like to invite the Court's attention to Page 11 of this same exhibit, and to all of the complete paragraphs which follow the small print on that page, beginning "During your committee's hearings . . ." and ending with the paragraph that commences "Mr. Metcalf . . ."

And I will be happy to have our witness read that, your Honor, or maybe we can have it written into the record by the stenographer, whichever you care to do.

The Court: It may be read.

Mr. Hitz: Thank you, your Honor.

I will read this, Mr. Tavenner. (Reading) "During your committee's hearings in Dayton, Ohio, several witnesses connected with various institutions of higher learning in

the United States were subpoenaed. It was regretted that both Mr. Lee Lorch of Fisk University, Nashville, Tenn., and Robert M. Metcalf, of Antioch College, refused to cooperate with the committee and give us the benefit of their knowledge concerning the operations of the Communist Party.

"Mr. Lorch testified that he was a member of the National Advisory Committee for Aeronautics in 1946, and that prior to that had been employed by the same committee at Langley Field, Va.

[fol. 82] "Mr. Lorch in later testimony, refused on grounds of the first and fifth amendments, excluding the section relating to self-incrimination, to answer all questions relating to alleged membership in the Communist Party during this and subsequent periods, up until his employment at Fisk University in 1952.

"Mr. Metcalf readily admitted his participation in a Communist group at Antioch College, in the fall of 1945, and the spring of the following year. However, he refused to give your committee the identity of any of the individuals with whom he met during these periods."

We would like next to call the Court's attention, particularly in this exhibit, to Page 22, that portion entitled "Recommendations Based Upon Investigations and Hearings in the Year 1954," and to paragraphs one, two, and the last paragraph on 23 of that portion of the report.

The Court: You may read them into the record.

Mr. Hitz: Thank you. (Reading) "Many of the recommendations put forth by the House Committee on Un-American Activities for the year 1953 have already been enacted into law in one form or another. Among them are legislation cracking down on Communist-dominated labor unions, death penalty for espionage in peacetime, immunity for witnesses appearing before congressional committees, and the adoption of procedures withdrawing commissions from persons in the armed services taking the [fol. 83] fifth amendment when questioned by a duly authorized authority concerning membership in the Communist Party.

"In addition, Congress considered the delicate subject of outlawing the Communist Party and has enacted a partial outlawing provision which is now in effect."

By Mr. Hitz:

Q. Mr. Tavenner, is that the '54 amendment to the Internal Security Act known as the Communist Control Act of 1954?

A. Yes, sir.

Q. And was that passed by Congress after Mr. Russell testified and before this report was written?

A. It was, it was passed before this report was written, and I believe before he testified.

Q. I'm sorry. It was passed in August, '54, wasn't it?

A. Yes.

Q. And he testified in November.

Mr. Hitz: Now, may I read the last paragraph on Page 23, your Honor?

The Court: Yes.

Mr. Hitz: (Reading) "The committee further recommends that appropriate legislation be enacted requiring an affidavit by any person bidding for a Government contract, that he is not now and has not been within the past 10 years a member of any organization advocating the overthrow of the Government by force and violence."

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[fol. 84] (Whereupon the witness, Frank S. Tavenner, resumed the witness stand and testified further as follows:)

• Cross examination.

Mr. Fanelli: For the record, I'm about to ask this witness some questions based on Government Publication which is headed "Investigation of Communist Activities in the Dayton, Ohio Area—Part 3. Hearing Before the Committee on Un-American Activities, House of Representatives, Eighty-Third Congress, Second Session, September 15, 1954," and I would like to ask counsel for the Government if he has an extra copy of this. I would just as soon have the witness have it, and for his assistance in refreshing his recollection on the questions I am about to ask.

Do you have it, Mr. Tavenner?

The Witness Tavenner: Yes, sir, I have it before me.
Mr. Fanelli: Fine; very good.

By Mr. Fanelli:

Q. Now, Mr. Tavenner, will you turn to Page 709—

Mr. Hitz: That's 7009, I think.

By Mr. Fanelli:

Q. 7009, and I ask you whether the defendant here testified on September 15, 1954.

A. Yes, sir, he did.

Q. And does this document, beginning at 7009, set forth the questions that were asked and the answers he gave on that occasion?

A. Yes, sir, it does.

[fol. 85] Q. Now, will you look at Page 7008 and inform the Court as to what members of the committee were sitting during the course of Mr. Russell's testimony in Dayton on September 15, 1954?

A. While Mr. Russell was a witness before the committee, there was only one person, one committee member present, Congressman Gordon H. Scherer, the chairman of the subcommittee.

Q. Thank you. Do you recall who the members of the subcommittee were, Mr. Tavenner?

A. Yes, sir.

Q. Could you inform the Court?

A. Mr. Kit Clardy from Michigan, Mr. Francis E. Walter from Pennsylvania.

By Mr. Fanelli:

Q. Now, will you turn to Page 7010, please, sir?

A. (Reading) "Mr. Tavenner: Mr. Russell, during the period of time that you were an undergraduate at Antioch College, were you aware of the existence of a Young Communist League organization within the student body?"

"Mr. Russell: I must respectfully decline to answer that question, sir. May I state my reasons?"

"Mr. Tavenner: Yes, sir.

"Mr. Russell: It is my understanding that the first amendment to the Constitution protects me against being [fol. 86] forced to disclose any information about my opinions, political beliefs, and associations. I believe that that question violates that privilege, and I therefore decline to answer."

By Mr. Fanelli:

Q. Now, Mr. Tavenner, would you be good enough, please, to turn to the next page, 7011, and I ask you whether or not on that page you ask him the circumstances under which he had met Herbert Reed?

A. Yes, sir.

Q. And at that time did he decline to answer that on the basis of the first amendment?

A. He did.

Q. And the question of the circumstances under which he met Herbert Reed is a count in the indictment, is that right? I think it's two or three.

A. No, sir. No, sir.

Q. Would you look at Count 1?

A. Yes, sir, I am looking at it.

Q. "... the occasion of your seeing Herbert Reed in the mid-forties?"

A. Yes, I see that.

Q. Now, also on 7011, will you examine that page and see whether you ask him whether Mr. Strunk was correct in his testimony that Mr. Russell had paid dues to the Communist Party in Dayton before moving to Yellow Springs in 1948.

A. Yes, sir, such a question was asked.

Q. And can you tell us the nature of Mr. Russell's answer?

A. The witness declined to answer on the grounds previously assigned by him.

[fol. 87] Q. Thank you, sir. Now, also—

A. Excuse me.

Q. Pardon me.

A. He did not assign the grounds for his refusal to answer.

Q. I see. Now, will you look again on that page and see whether you asked Mr. Russell whether he was in the Communist Party at any time prior to moving to Yellow Springs in '48?

A. Yes, sir, I see it.

Q. And what was the nature of the defendant's response?

A. He declined to answer the question as to whether or not he was a dues-paying member of the Communist Party, with his membership in Dayton, prior to his moving to Yellow Springs in 1948.

Q. And now also on the same page, I believe, Mr. Tavenner, do you see that you asked him whether he was presently a member of the Communist Party, that is, presently as of that time?

A. Yes, sir.

Q. Down near the bottom. And what was the nature of his response?

A. He refused to answer the question on the grounds that he had previously assigned.

Q. Thank you. Now, a few lines down from there, on Page 7011, do you see the line "Mr. Tavenner: I have no further questions."?

A. Yes, sir.

Q. And did you have no further questions at that time, Mr. Tavenner?

A. Yes, sir, I did. I did have further questions.

Q. You did have further questions?

A. Yes.

[fol. 88] Q. Now, do you see the next line: "Mr. Scherer: Witness excused."?

A. Yes, sir.

Q. Was the witness excused at that time?

A. He was.

Q. Did you at that time, Mr. Tavenner, you say you did have further questions?

A. I did.

Q. Did you expect, in the light of those further questions, to have him subpoenaed for another appearance?

A: I expected to report to the committee what the other questions I had in mind asking, for a decision as to whether or not he should be recalled at a later date.

Q. You did not, however, Mr. Tavenner, keep him under subpoena and subject to further call?

A. No, I did not.

Q. He was completely excused on that day?

A. He was.

Q. Were you aware of the fact at the time, Mr. Tavenner, that you didn't have a quorum present?

A. I was.

Q. Now, Mr. Russell appeared on another occasion in connection with the House Committee on Un-American Activities; did he not?

A. Yes, sir, he did.

Q. Do you remember what date he appeared?

A. The 17th of November, 1954.

Q. And do you recall whether another subpoena was served on him to appear at that time?

A. Yes, sir, it was.

Mr. Fanelli: Now, your Honor, for the sake of the record, the next line of questions are going to be asked from this [fol. 89] same series of published documents, hearings of the committee, but this is "Investigation of Communist Activities in the Dayton, Ohio, Area—Part 4", and we will see if we can find you an extra copy of that.

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Q. Now, Mr. Tavenner, during the period between Mr. Russell's appearance in Dayton and his appearance in Washington, had anything happened to give you a basis for believing that he was not going to claim the first amendment on that second appearance? —

A. There was one thing which occurred that indicated that he may not.

Q. Could you tell us, please, what that was?

A. At the time of the service of the subpoena on him by an investigator of the committee, he showed a desire to get in touch with the proper member of the staff to confer with him.

Q. Was—

Mr. Hitz: Could you clear up which subpoena that was, the Dayton subpoena or the Washington one?

By Mr. Fanelli:

Q. No, this would be the Washington subpoena, is that right?

A. That's right.

Q. Right. You would have decided to recall him before your committee staff member talked with him, in serving the subpoena, is that correct?

A. That's correct.

Q. And also at that time was there some question, Mr. [fol. 90] Tavenner, as to the date of his appearance in Washington?

A. He was subpoenaed for a definite date, and the witness got in touch with the committee and advised it of some, advised the committee of some reason why that was inconvenient, and we changed the date for his appearance.

Q. Now, Mr. Tavenner, when he appeared in answer to this subpoena, and in Washington, did you have what you believed to be a quorum?

A. Yes, it was the full, it was the full subcommittee.

Q. Well, there's an issue on that. But at least you thought it was a quorum, is that correct?

A. Surely.

Q. And, so far as you knew, the committee thought it was a quorum.

A. Yes.

Q. Now, will you look at Part 4, Mr. Tavenner?

A. Yes, sir.

Q. And will you look at Page 7079?

A. Yes, sir.

Q. And the third line is a question there by you: "Mr. Tavenner: Both of those individuals . . ." Would you read that question, please?

A. (Reading) "Mr. Tavenner: Both of those individuals have testified before this committee and have advised it, in public session, that there was, during the period they were at Antioch College, or a part of the time they were there, a group or cell of the Young Communist League.

"They have told us that that Young Communist League was organized and activated and conducted by a person who [fol. 91] was not in any way connected with Antioch College, a person by the name of Herbert Reed.

"They have advised us that Herbert Reed was an organizer for the Communist Party in the Dayton area, though not at Yellow Springs, which is the seat of Antioch College.

"You were acquainted with Herbert Reed, were you not?"

Q. And the witness answered yes he was, isn't that correct?

A. Correct.

Q. And then you asked him when he had last seen Herbert Reed, is that correct?

A. Yes.

Q. And then following that did you ask the following question—if you will look toward the bottom of the page: "Mr. Tavenner: All right. What was the occasion for your seeing him"—that is, Mr. Reed—"at that time?"

A. Yes, sir.

Q. Do you see that? Now, will you read Mr. Russell's answer?

A. (Reading) "Mr. Russell: I believe I will decline to answer that question on the same grounds that I declined to answer similar questions at the public hearing in Dayton. That is, Mr. Tavenner, it is my belief that the first amendment to the Constitution, as well as the spirit of the whole Bill of Rights, protects me against being forced to disclose any information about my opinions and political beliefs and associations."

Q. Then Mr. Clardy asked the question as to whether he was raising only the first amendment or also the fifth [fol. 92] amendment, and Mr. Russell said he was not raising the fifth amendment, is that correct?

A. That is correct, yes, sir.

Q. Now, was that the first question you had asked on that appearance that involved, in any way, any Communist Party membership or activity on the part of Mr. Russell?

A. I believe that to be the first question directed at personal participation by him. If you will give me one moment to verify that. (Examining document.) Yes, sir.

Q. And did he thereafter, on the questions of the committee concerned with Communist Party activity or membership, persist in standing on the first amendment during that appearance?

A. My recollection is that he declined to answer any question relating to his own participation in Communist Party activities, the participation of any other person, or any knowledge of Communist Party activity.

Q. Now, after this reiteration of the claim of the first amendment on Page 7079, did you have any reason to believe that he was going to tell you anything about the Communist Party?

A. Well, I had the hope that he would. The hope. I had no particular reason one way or the other.

Q. You went on to ask him in substance the questions you had asked him in Dayton, isn't that correct?

A. I asked him, I asked him the same questions that I would have virtually—I covered the same field that I would have covered at Dayton, if matters had not developed as they had.

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[fol. 93] By Mr. Fanelli:

Q. Now, will you look at Page 7078, please?

A. Yes, sir.

Q. Do you see a statement there by the chairman saying, "The shortness of time allotted to the conduct of the hearings in Dayton has resulted in the necessity of continuing that hearing by calling several witnesses for further testimony."?

A. Yes.

Q. Now, will you turn back to Part 3, which we were examining a moment ago, and will you turn to the date on which Mr. Russell testified, that is, September 15—or they're all on September 15. But will you turn to Mr. Russell's testimony?

A. Yes, sir.

Q. And now will you leaf through Mr. Russell's testimony and tell us whether any other witnesses testified after Mr. Russell on that day?

A. Yes, sir. Yes, I recall that they did.

Q. Mr. Romer testified after Mr. Russell, did he not?

A. That's correct.

Q. And Mr. Glatteman testified after Mr. Russell, did he not?

Q. And Mr. Williamson testified after Mr. Russell, did he not?

A. Yes, sir.

A. That's correct.

Q. So that there were—this is less than my fingers, and I ought to be able to count them—there were one, two, three witnesses testified after Mr. Russell on the 15th of September, is that correct?

[fol. 94] A. The hearings closed at, by the chairman after the end of the testimony of the second witness referred to by you, and a moment or two after that the third witness, Mr. Williamson, appeared and expressed a desire to testify. It's my recollection he had not been subpoenaed. The chairman reopened the hearing to permit him to make such a statement as he desired to make.

Q. And there was time on that day to do that, was there not?

A. Actually, the committee, the quorum of the committee had been broken because of the necessity of members to leave. So the work was not official committee work, it might be said.

Q. And did you call Mr. Russell in Washington to have this official committee work?

A. How is that?

Q. Did you call Mr. Russell for an appearance in Washington so that his appearance would be official committee work?

A. No, it was not called for that purpose. It was hoped that Mr. Russell, if he appeared before a legally constituted committee, or subcommittee, might testify. I thought he would do it, or I would not have called him, in all probability, that afternoon in Dayton. I thought at that time that Mr. Russell would cooperate with the committee. He did not. And I broke the questioning up and did not follow through on it.

Q. Was it your thought that Mr. Russell might take notice of the absence of a quorum in Dayton?

A. Yes, it was.

[fol. 95] Q. And take note of the presence of a quorum—

A. It was. And I so reported it to the chairman.

Q. You didn't have any information that indicated he was a lawyer, did you?

A. That what?

Q. You didn't have any information that indicated that Mr. Russell was a lawyer?

A. No.

Q. You knew his background, did you not? That is, you knew the kind of occupation in which he was engaged.

A. I knew he was not a lawyer.

Q. Now, will you again, on Part 3, will you turn to Page 6953? That's right; it's right close.

A. Yes.

Q. And will you confirm for the Court, please, that Mr. Lee Lorch testified on September 15?

A. Yes, he did.

Q. And will you examine his testimony for the purpose of informing the Court as to whether he, too, declined to answer questions concerning Communist Party, or Communist Party activity on the ground of the first amendment?

A. It's my recollection that he did. I recall that independently of examining the record.

Q. Very good. Did you call Mr. Lorch for another appearance in Washington?

A. No, I did not.

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By Mr. Fanelli:

Q. I think you have already stated you did not call Mr. Lorch in Washington.

A. We did not, no, sir.

Q. But he claimed the first amendment.

A. Yes.

[fol. 96] By Mr. Fanelli:

Q. Now, when Mr. Lorch testified, was there a subcommittee sitting?

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A. Yes, sir.

By Mr. Fanelli:

Q. And what members of the subcommittee were present?

A. Two members of the subcommittee of three that was appointed to sit in Dayton. The two that were sitting were Congressman Gordon H. Scherer and Congressman Kit Clardy.

Q. So you had a quorum present?

A. Yes.

Q. Now, will you turn past Mr. Lorch's testimony, to Page 6968, and would you confirm for the Court that Mr. Robert M. Metcalf was the next witness?

A. Yes, sir.

Q. Now, do you recall—and if you do not recall would you refresh your recollection—that he, too, claimed the first amendment on questions as to Communist Party?

A. I recall independently of the record that he did.

Q. And was there a quorum still sitting?

A. Yes.

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Mr. Fanelli: Your Honor, on Government's Exhibit No. 5, all of which was introduced in evidence by the Government yesterday, this is the annual report of the committee for the year 1955—4, annual report for 1954—we'd like the following portions of this—if it may be stipulated—read into the record at this point. And we will just note it for the record.

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[fol. 97] (The following inserted by the reporter as set out by Mr. Fanelli:)

“On the basis of hearings and investigations, the committee during 1954 issued several reports to the Congress and the American people. The first of these reports was ‘Colonization of America's Basic Industries by the Communist Party of the U.S.A.’ This report reflects the committee's findings on the Communist Party's endeavors to secure a foothold in the vital basic industries of this country. The committee points out in this report that the Communist Party had directed its intellectuals and white-collar workers to leave employment in their own chosen fields and

to obtain positions in industries vital to defense, such as steel, electricity, and the maritime. In many cases, persons were required to leave their homes and travel to distant cities in order to carry out this Communist directive. The committee issued this report to warn and alert the Congress and the industries involved regarding these efforts by the Communist Party in the United States."

Mr. Fanelli: On Page 3, the last full paragraph before the title, title near the bottom, which reads: "Investigation of Communist Activities in Various Cities and States."

"In addition to the hearings and reports of the committee during 1954, there has been continued the singularly valuable service provided to Members of Congress, congressional committees, and duly authorized agencies of the [fol. 98] Federal Government by the committee's files and reference service. With the ever-increased interest aroused by the expanded knowledge of subversive activities, there has been a proportionate increase in requests for information from the committee."

Mr. Fanelli: On Page 4, the fourth full paragraph—I'm sorry. The fourth and fifth full paragraphs on Pages 4 and 5. All of the material between the title "The Baltimore Area" on Page 4, to the title "State of California (San Diego)" on Page 5.

"Mr. Bernhard Deutch was identified as having been a member of a graduate group of the Communist Party while attending a prominent university in upper New York State (Cornell). Mr. Deutch was subpoenaed before the committee in Washington, D. C., on April 12, 1954, and questioned concerning his knowledge relative to his Communist Party membership and associations. He testified that he had been a member of the Communist Party until about the summer of 1953. However, he also stated 'To a great extent, it is only fair to say, I am a Marxist today—I don't want to deny that.' Aside from mentioning his own Communist Party membership, he refused to give the committee the benefit of his knowledge and information concerning his Communist Party activities and associations."

"Thereafter, on May 11, 1954, after unanimous vote by the committee itself, the House of Representatives, by vote of 346 to 0, cited Bernard Deutch for contempt of Congress.

[fol. 99]

"The Baltimore Area

"During July 1953, a subcommittee holding hearings in New York City received testimony from Mr. Leonard Patterson, a former member of the Communist Party and the Young Communist League.

"In this testimony Mr. Patterson related that during 1935, while he was an organizer for the Young Communist League in Baltimore, two young ministers had visited the Communist Party headquarters in Baltimore, Md. Mr. Patterson was unable to recall the names of these young men but did recall that they informed him that they were graduates of Union Theological Seminary in New York City, and that they had but recently arrived in Baltimore to take up ministerial assignments, and that the purpose of their visit to Communist Party headquarters was to ascertain whether the Communist Party had need of their services in that city. Acting upon the basis of this testimony the Committee on Un-American Activities directed that an investigation be conducted to ascertain the facts relating to this situation. As a result of this investigation, the committee received the testimony of Mr. Earl Reno. Mr. Reno advised that he was a past member of the Communist Party and that during the period of 1935 he was an organizer for the Communist Party in Baltimore, Md. He recounted that frequently during this period he used the assumed Communist Party name of Earl Dixon. He also recalled that two young theological graduates had come to Communist Party headquarters and offered their services to the Communist Party. It was his recollection that they had both stated they had previously participated in Communist Party work in New York City. Reno stated that he had discouraged either of them from taking out actual membership in the Communist Party but accepted their assistance in helping such Communist Party fronts as the Ethiopian Defense Committee and the American League Against War and Fascism. He recalled that he had often

used them to make speeches in different street-corner gatherings in Baltimore.

"In the course of the investigation the committee heard the testimony of Rev. Joseph Nowak, at which time he admitted that he was one of the two ministers referred to by Patterson and Reno. He admitted going to the Communist Party headquarters on several occasions and assisting Mr. Patterson in the development of the Ethiopian Defense Committee and the American League Against War and Fascism, and that he had become an official of the latter organization.

"Reverend Nowak identified Rev. John Hutchison as the other minister who accompanied him to the Communist Party headquarters in August 1935. Reverend Nowak testified that while he followed the Communist Party line and worked closely with the Communist Party during the period he was in Baltimore, Md., he had not actually become a member of the Communist Party until May 1946 in Chicago, Ill.

"On March 18, 1954, Rev. John Hutchison testified before [fol. 101] the committee and emphatically denied accompanying the Reverend Nowak to the office of the Communist Party in Baltimore, Md., in August of 1935. He denied ever having visited the office of the Communist Party and denied ever having known Mr. Leonard Patterson or Mr. Earl Reno, either by that name or the name of Earl Dixon. As a result of the obvious discrepancy in the testimony of these individuals the committee referred all of the testimony relating to this situation to the Department of Justice for its consideration as to perjury."

(The following is the single paragraph outlined at the bottom of Page 5:)

"The committee added to its wealth of sworn testimony, which will assist it in its legislative functions, a considerable volume of information furnished by many witnesses who related their experiences as past Communist Party members in San Diego."

Mr. Fanelli: On Page 6, the second full paragraph under the heading "Chicago, Ill."

The Court: That reference is a little ambiguous. Is it the second paragraph following "Chicago, Ill."?

Mr. Fanelli: Yes, sir. I'm sorry.

"The subcommittee received testimony in elaboration and corroboration of previous testimony relative to the Communist control of the Farm Equipment Workers of the [fol. 102] United Electrical, Radio, and Machine Workers of America (FE-UE). This testimony was furnished the committee by Mr. Walter W. Rumsey. In the course of this testimony Mr. Rumsey identified as a Communist, John T. Watkins, who has served as an official of the United Farm Equipment and Metal Workers before and after its expulsion from the CIO. The Committee investigators endeavored to locate Mr. Watkins as well as Abe Feinglass, another union official who had been identified as a member of the Communist Party. These efforts were unsuccessful and Mr. Watkins and Mr. Feinglass were heard later in Washington, D. C. In view of Mr. Watkins' denial of Communist Party membership and his refusal to answer questions concerning individuals known to him as being members of the Communist Party, the committee voted to refer all testimony relating to this matter to the Department of Justice for possible perjury prosecution and the Congress subsequently approved the committee's recommendation that Mr. Watkins be cited for contempt of Congress."

Mr. Fanelli: On Page 7, all of that page from the beginning down to paragraph which starts "The following witnesses added to the knowledge of Communist activities . . ."

"Vernon Todd Riley was an employee of the Federal Government from 1942 to 1954. In December 1948, Riley was afforded his first hearing before an agency loyalty hearing board. [fol. 103] Transcripts of these and subsequent hearings afforded Riley were turned over to the committee by Riley himself. The investigation which provided the basis for Riley's hearings was conducted by the FBI under the provisions of an Executive order.

"The transcripts furnished the committee by Riley reflected that the major charges against him in 1948 were that:

"(1) A reliable and confidential informant for the FBI reported that in 1941, 1942, and 1943, while in Spokane, Wash., Riley was a member of the Communist Party;

"(2) Confidential informants also reported that Riley had attended numerous Communist Party meetings while in Spokane;

"(3) Also, while in Spokane, he was an officer in a Communist Party group;

"(4) In 1943, when Riley moved to Washington, D. C., a Communist Party transfer card was made out in his name, transferring him from a Communist Party group in Spokane, Wash., to one in Rockville, Md. A photostatic copy of this transfer card was obtained and made a part of Riley's record.

"In this and other loyalty board hearings, which were held in 1948, 1951, 1953, and 1954, Riley denied all these allegations, although he admitted that he was a member of a 'study group' while in Spokane. Likewise, at all the hearings, he was cleared and retained in the employ of the Federal Government.

[fol. 104] "The committee became interested in the Riley case in December 1953. On January 27, 1954, Riley's employment with the Federal Government was terminated, effective February 1, 1954. On March 15, 1954, Riley appeared before the committee in Chicago, Ill., at which time he again denied Communist Party membership and the other allegations. The committee was able to obtain another witness for the Chicago hearing who admitted having been a member of the Communist Party in Spokane and having also been in the same Communist Party group with Riley. The fact that Riley was an active member of the Communist Party in Spokane was later substantiated by the testimony of Barbara Hartle, a long-time Communist Party functionary in the Northwest area. Mrs. Hartle appeared before the committee in June 1954 in Seattle and furnished information regarding Riley, plus invaluable information concerning Communist Party activities in general in the Northwest area."

Mr. Fanelli: On Pages 11 and 12, the material which begins with the last full paragraph on Page 11, to the end of the same paragraph which is completed on Page 12.

"At the closing of all hearings of your committee, the chairman of the committee or subcommittee makes available an opportunity for any person named during the committee hearings to deny or explain any of the testimony taken during that or previous hearings. Such an invitation [fol. 105] was extended by Congressman Scherer at the close of the Dayton hearings. No one came forward and the hearings were officially concluded."

Mr. Fanelli: On Pages 14 and 15, the material which begins with the last paragraph on Page 14 and ends at the completion of the first full paragraph on Page 15.

"These hearings could be properly considered as a continuation of the hearings which the Committee on Un-American Activities held in Detroit, Mich., in 1952. As a matter of fact, in 1952 the committee reported that during its investigation the identity of over 600 individuals as Communist Party members was obtained.

"The 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success. The concentration of the Communist Party as outlined by this report is not the figment of a dream by the committee but comes directly from the Communist Party itself. This concentration is set forth in a directive to all Communist groups, sections, commissions, and departments, which the committee obtained during its investigation. This directive, while intending to advertise the Communist Party as an organization interested in furthering the trade-union movement, falsifies its own advertisement [fol. 106] by placing all emphasis on the need to repeal all laws used against the Communist Party and its members, including the Smith Act, the non-Communist affidavit section of the Taft-Hartley law and the Walter-McCarran Immigration Act. Of secondary importance in the directive, but equally stressed, is what the Communists

refer to as 'the People's Peace' program. This program is set forth as a campaign against NATO, friendship with the Soviet Union, and the opening of trade channels with the 'People's Democracies,' China, and the Soviet Union."

Mr. Fanelli: On Page 16, the third full paragraph on that page.

"Communist Party colonizers, similar to the 25 exposed in Flint and other Michigan hearings, were the main target of the committee's 1954 investigation. Lack of adequate investigative personnel made it impossible to expose fully the infiltration in Michigan. Left in a pending stage were partial identities of some 75 other members of the Communist Party sent into the Michigan area for the purpose of building up the Communist Party's concentration within the auto industry. The committee regrets that it was unable to complete its investigation in this field, but, at the same time, it feels that, if industry and labor would concern themselves more with the infiltration into their midst of potential Communist saboteurs, they could be removed from the auto industry without need of congressional investigation."

[fol. 107] Mr. Fanelli: On Page 17, the first full paragraph on that page, and the second full paragraph on Page 17.

"During the committee's investigation, it uncovered members of the Communist Party holding influential positions in the school systems of Detroit and other communities. Most of the teachers subpoenaed before the committee refused to answer questions with respect to their membership in the Communist Party, on the ground that to do so would tend to incriminate them. Most of the teachers called have been suspended or permanently removed from their positions. The Committee on Un-American Activities approves of this action because the committee has found that the delivery of a student into the tutelage of a member of the Communist Party has been responsible for the destruction of thousands of American homes. It is horrible enough to lose 13 Americans to Red China as a result of a war, especially when the war was not of America's choos-

ing. It is far more horrible to lose one American to the Communist conspiracy through a teacher in a free educational institution of America.

"As a result of the hearings held in Michigan in 1952 and again in 1954, the Committee on Un-American Activities calls upon the American Labor movement, in addition to its ever increased vigilance toward communism, to amend its constitutions where necessary in order to deny membership to a member of the Communist Party or any other [fol. 108] group which dedicates itself to the destruction of America's way of life. It is certainly not within the best interests of the security of the United States, nor of the interest of the unions, to permit a member of the Communist Party or any other totalitarian party to work 8 hours a day in an American industry with the protection of a union contract and, at the same time, supply him with a captive audience of thousands through which he can preach his program of destruction. It is said that the worker is far too smart to be suckered into accepting the Communist harangue. It is admitted that the American worker, through education on the evils of communism and other totalitarianisms by both his union and his employer, has more knowledge on the subject today than at any time during his life. Nevertheless, the Communist Party is receiving new recruits daily from the ranks of labor, admittedly not so many as in the past. It is difficult to believe, however, that this recruitment would be as great if Communist Party organizers and advocates were removed from the captive audience which union and industry place around them in the shop."

Mr. Fanelli: On Pages 18 and 19, the paragraph which begins immediately under the heading "Pacific Northwest Area" and is completed on the following page.

"The House Committee on Un-American Activities held hearings in Portland, Oregon, June 18 and 19, 1954. The [fol. 109] hearings and investigation centered largely around communistic infiltration of education, professional groups, and labor. The committee received valuable testimony from Homer LeRoy Owen, Barbara Hartle, and Robert Wishart Canon, all of whom testified about Com-

munist activities and infiltration not only in Portland, Oregon, but throughout the Northwest and other parts of the United States. Some 14 other individuals identified as having been members of the Communist Party appeared before the committee and refused to affirm or deny their Communist Party membership. Several refused to answer questions pertaining to their past education, employment, residences, and military service. Thereafter, on July 23, 1954, after unanimous vote by the committee itself, the House of Representatives, by vote of 376 to 0, cited Thomas G. Moore, John Rodgers MacKenzie, Donald M. Wollam, and Herbert Simpson for contempt of Congress."

By Mr. Fanelli:

Q. You testified that the chairman of the committee in Washington, at Page 7078, of Part 4, stated that: "The shortness of time allotted to the conduct of the hearings in Dayton has resulted in the necessity of continuing that hearing by calling several witnesses for further testimony." Now, would you tell us, please, Mr. Tavenner, what other witnesses who testified in Dayton were called for further testimony in Washington, other than the defendant here.

A. There were no others that had testified, but there were [fol. 110] others called who were referred to in that testimony.

Q. One of those would be Miss Irene Jacobs?

A. Yes.

Q. Now, there was another witness, a Robert A. Harrison, who was connected with the Dayton inquiry, was heard in Washington also, is that correct?

A. I do not recall.

Q. Well, would you remember him if I were to tell you that you did have a Mr. Harrison testify before you in Dayton, but it turned out to be the wrong Harrison, and you had the right Harrison appear in Washington, is that correct? I think if you will examine that, you will see.

A. I do not recall the circumstances about which you have mentioned.

Q. Would you look at Page 7090, and thereabouts, and see if you can refresh your recollection?

A. I see that a Mr. Harrison did testify before the committee on November the 18th, 1954.

Q. Would you look at Page 7090? You said, Mr. Tavenner: "In September and it developed the subpoena was served on another person by the same first name and same middle initial."

A. That refreshes my recollection.

Q. Does that refresh you? All right. Am I right on the statement I made as to the Harrisons?

A. Yes, sir.

Q. Now, the chairman, in opening these hearings in Washington, or in Dayton, stated that complaints had been received about the Dayton area; do you recall that?

A. My recollection is there was a statement to that effect made by the chairman of the subcommittee in Dayton.

Q. In Dayton, is that correct? Now, could you tell us, Mr. Tavenner, what the nature of those complaints was?

Mr. Hitz: Excuse me. I object, because that is not relevant to any issue in the case. We have not resorted to investigative material or complaint in order to prove pertinency in this case. As has been indicated in my reference to the Morford case, I think it was, that where the Government does not go into the investigative material of the committee to prove pertinency, that the defense may not subpoena that material in a fishing expedition. Mr. Fanelli is now seeking to do that by questioning as distinguished from a subpoena. Otherwise, the ruling in the Morford case which denied admission in evidence of that material, and quashed the subpoena, is directly in point.

The Court: Sustained.

By Mr. Fanelli:

Q. Mr. Tavenner, will you now turn to Part 1, now, please?

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By Mr. Fanelli:

Q. Now, will you turn, Mr. Tavenner, to Page 6820?

A. All right, sir.

Q. And do you see in the middle of the page, as you were asking Mr. Strunk questions, do you see a statement by [fol. 112] you: "If it is a deceased person involved, don't

mention the name at all. There is no value to that. Do you understand?" Do you see that statement?

A. Yes, I do.

Q. Now, would you please explain to the Court why the name of a deceased person is of no value and the name of a live person is?

A. Well, in making an investigation of Communism you cannot make it in a vacuum. You must make an investigation of individuals. If the individual was deceased, there could be very little point, unless there was something outstanding about his activities that would aid the committee in following up and understanding what the man is now doing. That is, that's the principal thing I had in mind in that case, in that instance. There have been many instances in which I have insisted that the name of a deceased person be mentioned where I had reason to believe that they had played such an important part in Communist activities that it was necessary to mention their names.

Q. Now, will you turn to Page 6827?

(Witness complies.)

Mr. Fanelli: Your Honor, that's rather long. May I ask that that be read into the record as if the witness had read it? It starts with "Mr. Clardy", at the bottom of the page—Mr. Clardy was the chairman, acting chairman of that committee—and to the end of his statement down to "Mr. Scherer", on Page 6828.

[fol. 113] The Court: It will be received, and be deemed read into the record with the understanding concerning transcribing that we have heretofore had.

"Mr. Clardy: Mr. Chairman, I tied that in there now because about a week ago Thursday or Friday I wrote the Attorney General, calling his attention to some of the facts that we have thus far accumulated in connection with the Square D strike and the fact that it is being directed by a man that we have identified as a Communist. I called his attention to the fact that several others were Communists, and asked him to invoke the new Anti-Communist Act that is now on the books.

"In other words, I think this will give him the first and best opportunity to test out some of the questions that are bound to be raised in connection with it. There is no doubt about the fact that that strike is started by the Communist Party, carried on and directed by Communists, and is being done so for the purpose of interrupting the program of arming the Nation against Communist threat."

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By Mr. Fanelli:

Q. Would you look at Page 6821, and would you please read the paragraph in the middle of the page, which is a statement by Mr. Strunk that begins "Roger Dunham, R-o-g-e-r D-u-n-h-a-m." Do you see it? It's four lines.

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[fol. 114] Mr. Hitz: I object to that as irrelevant, your Honor.

Mr. Fanelli: Well, then, may—

The Court: I can't—

Mr. Fanelli: Can we have it read to, at least to see what the question was, your Honor? May I put it into my question?

The Court: You may offer in evidence— There is no objection, I take it, on the ground this isn't an authentic copy of the actual record.

Mr. Hitz: I don't make that objection here. I make it on the matter of relevancy.

Mr. Fanelli: Your Honor, we offer the paragraph reading "Roger Dunham, R-o-g-e-r D-u-n-h-a-m. He was also an undercover operator for the FBI. He was exposed at the Hupman trial last year. He was the agent for the Dayton section, took care of the Worker and Daily Worker."

The Court: Objection sustained.

Mr. Fanelli: Very well.

By Mr. Fanelli:

Q. Now, will you turn to Page 6836?

Mr. Fanelli: And here, your Honor, we offer—this is rather long—all the testimony of Mr. Strunk, from which

the Government offered testimony yesterday, which was admitted, beginning at the very bottom of the page, "Norton Anthony Russell," and continuing on to Page 6837, to [fol. 115] Mr. Strunk's response, "Not personally."

Mr. Hitz: No objection to that.

The Court: Received.

"Norton Anthony Russell. He lives on President Street, Yellow Springs, Ohio. During the time when Anthony Russell used to live in Greenmont Village, we had several meetings in his house, and he was a member of the Communist Party, belonged to the professional group, as far as I remember.

"Mr. Tavenner: When you say that you had several meetings in his house, what kind of meetings were you referring to?

"Mr. Strunk: Communist Party meetings in his house.

"Mr. Walter: Approximately when was that, Mr. Strunk?

"Mr. Strunk: This is several years ago.

"Mr. Walter: Was it after the attack that was made on South Korea?

"Mr. Strunk: Before.

"Mr. Walter: Before.

"Mr. Strunk: It was before.

"Mr. Walter: Before June 1950?

"Mr. Strunk: Yes, it was before.

"Anthony Russell moved to Yellow Springs, working for Vernay Laboratories in Yellow Springs. He wasn't very active since he moved over to Yellow Springs. He [fol. 116] attended once a Communist Party picnic in Bryan State Park. That is the last time I heard about Anthony Russell. He did pay me dues years before when he was a member of the Communist Party.

"Mr. Tavenner: Did you receive any dues from him after he moved to Yellow Springs?

"Mr. Strunk: Not personally."

Mr. Fanelli: And on the same page, your Honor—I'm sorry. Well, on Page 6837, we offer the short paragraph of Mr. Strunk's testimony reading: "Herbert Reed, H-e-r-b-e-r-t R-e-e-d. He used to be in Dayton, in the beginning,

when I joined the Communist Party. He was an officer in the Communist Party.

"The time, I don't know exactly what year. He left later, and when I became a Communist, he was not in Dayton any more, but I knew him."

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GORDON H. SCHERER, called to testify as a witness in behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hitz:

Q. Mr. Scherer, will you give your full name, please, sir?

A. Gordon H. Scherer.

[fol. 117] Q. That's S-c-h-e-r-e-r?

A. That's correct.

Q. You are a member of Congress, are you, sir?

A. I am.

Q. From what state?

A. State of Ohio.

Q. And the district, sir?

A. First Congressional District of Ohio.

Q. How long have you been in Congress, Mr. Scherer?

A. This is my fourth year, second term.

Q. Were you a member of Congress in the term of 1953 and 4?

A. I was.

Q. Were you on the Un-American Activities Committee during that session?

A. I was.

Q. Or that term?

A. I was.

Q. Were you present at the time that Norton Anthony Russell testified in Washington, D. C. in 1954?

A. I was.

Q. In November?

A. I was.

Q. Do you recall the date of the appearance of Mr. Russell here?

A. I can't recall the exact date. It was sometime in November of 1954.

Q. He only appeared once in Washington, is that correct, sir?

A. Once in Washington, once in Dayton.

Q. Yes. Would you tell me whether you were a member of the subcommittee on that particular day?

A. I was a member of the subcommittee.

Q. Will you tell me how you were appointed to the subcommittee, sir?

A. I was appointed by Congressman Harold Velde, who [fol. 118] was chairman of the House Committee on Un-American Activities at that time.

Q. Who else was appointed to the subcommittee at the time?

A. Mr. Clardy of Michigan and Mr. Walter of Pennsylvania.

Q. Now, did you three members of Congress, appointed in that fashion by the chairman, hold a meeting of the subcommittee on that day?

A. We did.

Q. Was it an afternoon or morning session at which Mr. Russell appeared?

A. There were two sessions. Mr. Russell appeared in the afternoon session.

Q. And when were you three members of Congress appointed to comprise the three-man subcommittee by Mr. Velde?

A. It was during the recess between the morning hearing and the afternoon hearing.

Q. I see. And you were personally present when Mr. Russell gave his testimony, were you?

A. I was.

Q. And were Congressman Clardy and Mr. Walter present?

A. Congressman Clardy was present for the entire period of his testimony, as well as myself. Mr. Walter came in shortly after he began his testimony. No, Mr. Walter was

there while Mr. Russell, I believe, gave his testimony also. I'm not positive about that. I think Walter, Mr. Walter came in a little later that afternoon.

Q. In any event, were you and Mr. Clardy present [fol. 119] during Mr. Russell's testimony?

A. Yes, we were there.

Mr. Hitz: No further questions, your Honor.

Cross examination.

By Mr. Fanelli:

Q. How long have you been on the House Un-American Activities Committee, Mr. Scherer?

A. Ever since I became a member of Congress in January of 1953.

Q. And could you give this Court a rough estimate as to the number of days of hearings of that committee, or any subcommittee of it, that you have sat on while you have been on the House Un-American Activities Committee?

A. Without refreshing my recollection, I could not give you, I could not give you—

Q. Well, could you give us just a rough guess? Would it be a lot? Would it be a hundred, would it be five hundred, would it be two? Could you give us just your best estimation?

A. I am not in the position to tell you the number of hearings that I participated in in the last three and a half years without refreshing my recollection.

Q. Would you say that you work hard on that committee?

A. I didn't hear.

Q. Do you work hard on that committee in hearing witnesses? Are you one of the people that really carries the load on that committee, Mr. Scherer?

A. Well, I think I do my share of the work of the House [fol. 120] Committee on Un-American Activities.

Q. If I were to tell you that your annual report for the year 1954—this is Page 1 of Government's Exhibit No. 5 here—states that your committee heard nearly six hun-

dred witnesses in either public or executive session during the Eighty-Third Congress, alone, would that help you estimate for the ladies and gentlemen of the jury how many witnesses you might have heard?

A. Not all of those. A portion of those. Because I am not appointed to every subcommittee. What portion of those witnesses during that year I heard, I could not say without looking at the records and refreshing my recollection from the records. The records are available which will show exactly the number of subcommittees I sat on and the number of witnesses that appeared.

Q. Was your appointment to this subcommittee, to which you testified on direct-examination, made in writing?

A. No, it was not.

Q. How was it made?

A. Harold Velde called me on the telephone during the recess and said that he was appointing Mr. Clardy and Mr. Walter and myself, as the chairmen of the subcommittee, for the purpose of conducting the hearings that afternoon.

Q. And there was no other method of appointment for you? That was the exclusive way you were appointed to the subcommittee, by telephone call from Mr. Velde?

A. He may have put something on the record of the [fol. 121] committee, or may not. I do not know. That's the way I was appointed on the subcommittee, and have been appointed that way many, many times since I have been a member of the Un-American Activities Committee.

Mr. Fanelli: Your Honor, I would like at this time to move to strike his testimony. Possibly your Honor would prefer this at the bench. I am not quite sure of the proprieties of this.

The Court: You mean strike the last answer?

Mr. Fanelli: No, strike his testimony on direct, on the basis of the answers he has just given.

The Court: The motion is denied.

Mr. Fanelli: May I just state the ground of it, your Honor?

The Court: Yes. Will counsel come to the bench, please?

(The following discussion occurred at the bench outside the hearing of the jury:)

Mr. Fanelli: We move—I accept your ruling, your Honor, but I just—

The Court: Well, I'd be glad to hear your point for the record.

Mr. Fanelli: Yes. I am sure you know what it is, but I want it for the record.

We move to strike this witness' testimony on the ground that in a matter so serious as the liberty of a citizen of the [fol. 122] United States we cannot have convictions based upon telephone communications appointing subcommittees. If this were the subcommittee before the appearance, it had not been properly appointed, and would have to be a more formal basis for such an appointment, and that this testimony is irrelevant.

The Court: I will permit you to argue that when the Government has completed its case.

Mr. Fanelli: All right.

The Court: Of course, it can't prove all of the case at one time, and I am not passing necessarily on the legal point involved at this time except to deny the motion.

Mr. Fanelli: Thank you, very much.

(The following proceedings were heard in the hearing of the jury:)

By Mr. Fanelli:

Q. You have had a little time there. Do you feel that you could now estimate how many witnesses you have heard as a member of this committee?

A. Counsel, I think I have answered that question to the best of my ability.

Q. You can't do any better at this point?

A. Not at this point, no.

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[fol. 123] Redirect examination.

By Mr. Hitz:

Q. Would you be good enough to tell us whether or not the afternoon session, at which you have testified you were

appointed to be a member, followed the noon recess that we have mentioned just now?

A. That's right.

Q. And when, with respect to the morning session, the noon recess, and the afternoon session—

The Court: Well—

Mr. Hitz: (Continuing) —were you appointed by Mr. Velde?

The Court: That last question wasn't answered, I don't suppose.

Mr. Hitz: Oh.

The Court: You asked him to tell whether or not something was the case, and he said, "That's right."

Mr. Hitz: I must have taken the nod of his head.

By Mr. Hitz:

Q. Was the afternoon session of the committee on November 17, 1954, a session of the committee or of a subcommittee of that?

A. The afternoon session was a subcommittee of the House Committee of Un-American Activities.

Q. Is that the subcommittee meeting at which you have already testified on direct-examination that Mr. Russell appeared before?

A. That is right.

[fol. 124] Q. Is that the subcommittee that you have already given testimony about concerning which you were appointed by Mr. Velde to comprise one of the members?

A. That is right.

Q. The others being Mr. Walter and Mr. Clardy?

A. That is right.

Q. To be presided over by Mr. Clardy?

A. That's right.

Q. Now, Mr. Scherer, you were asked a number of questions concerning government print of Investigation of Communist Activities in the Dayton, Ohio, Area, Part 4, by Mr. Fanelli. Your attention was called to the fact that that document states on Page 7077 that the Un-American Activities Committee, not a subcommittee but the committee met at 10:14 in the morning, and that present were its chairman, Mr. Velde, and four other members of the com-

mittee. You recall your attention being cited to that fact as is printed here?

A. I do so recall.

Q. And then that on Page 7078 Mr. Russell is noted as having been sworn to be a witness by Mr. Clardy; is that correct, sir?

A. That's right.

Q. Now, this particular print, and particularly Page 7078, does not show any luncheon noon recess break, does it, sir?

A. That is right, it does not show that.

Q. Now, is that what the trouble is?

A. Yes.

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[fol. 125] Further redirect examination.

By Mr. Hitz:

Q. Mr. Scherer, will you look on your right there? Is that the original transcript of the proceedings?

A. This is the original transcript of the proceedings. I didn't know it was lying there.

Q. I didn't either. Is that the document from which you refreshed your recollection so you could give your testimony today?

A. Yes, this is it.

Q. Was that in the presence of a member of the staff that you saw that and refreshed your recollection?

A. Yes. Mr. Tavenner.

Q. When was that?

A. This morning.

Q. Yes. Now, does that—

A. Not here, but at the House Office Building in my office.

Q. I see. Does that show the events of the 17th of November in the sequence in which they occurred, actually took place?

A. Yes. This is a transcript of the stenographic notes.

Q. Yes, sir. Does it show the morning and the afternoon session?

A. It does.

Q. Does it show the break for lunch?

A. It does.

Q. Does it show, after lunch, the statement made by Mr. Clardy announcing the fact that he had been named the chairman of a subcommittee by Mr. Velde?

A. That appears in the record.

[fol. 126] Q. To be composed of you and Mr. Walter?

A. That appears in the record.

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AFTERNOON SESSION

(Court reconvened, all parties present, the witness, FRANK S. TAVENNER, resumed the witness stand and testified further on cross-examination, out of the presence of the jury, as follows:)

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Mr. Fanelli: Your Honor, just to expedite this, I'd like to proceed as if the witness were reading the sections of these documents that I am asking him to read, and let it be stipulated that they be copied in the record, in the absence of objection to any particular paragraph, and we may proceed faster. I can finish this up in fifteen or twenty minutes, if I may.

The Court: Very well. That may be the understanding.

Mr. Fanelli: In Part 1 of the hearings, of Government's Exhibit 3, Page 6840, that statement in the middle of the page by Mr. Clardy, which reads: "Mr. Clardy: I would like to see that done," etc., down to the end of that paragraph, ending, "an honest and complete story as to all of them."

"Mr. Clardy: I would like to see that done so that we may be sure that we have a complete and accurate record. Those [fol. 127] who are named by you are going to be given an opportunity by this committee to appear at some suitable time, if they desire. We would like to have it accurate, an honest and complete story as to all of them."

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Mr. Fanelli: Now, on the same page, about six lines down from that, the very next statement by Mr. Walter, which begins: "My purpose in developing this is quite obvious," and the remainder of his statement on that page.

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"Mr. Walter: My purpose in developing this is quite obvious. There are certain people who have contended that Russia was our friend and all of that business. But anybody that takes that position after the attack was made on South Korea is either a Communist or ought to be advised of the facts of life."

Mr. Fanelli: And on Page 6858, the statement by Mr. Strunk down below the middle of the page, begins, "This list is not too correct as to the date," and down to the end of that statement.

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"Mr. Strunk: This list is not too correct as to the date, but when I was exposed as an undercover agent and had to get—or couldn't belong to the Communist Party any more, these following people were still members of the Dayton [fol. 128] Communist Party, and people out of town which I knew through conversation with high party officials were still in the party:

"Joe Brant, Paul Dunman, Roger Dunham, Arthur Garfield, Joe Glatteman, Gus Hall, Melvin Hupman, Pearl Hupman, Anne Hill, Virginia Hipple, Frank Hashmall, Irene Jacobs, Julie Jacobs, Arnold Johnson, Lou Kaplan, Anton Kirschmer, Lou Secundy, Louis Ladman, Jim Lockwood, Alice Pearl Lockwood, Walter Lohman, Hy Lumer, Harry McGill, William Nelson, Betty Nelson, Forrest Payne, Lou Secundy, Arthur Garfield, George Siskind, William Thamel, Irene Thamel, Dwight Williamson, Martin Chancey."

Mr. Fanelli: On Page 6868, the statement, the first statement by Mr. Walter on that page, which begins, "You are not being tried for anything," and down to the end of that particular statement by Mr. Walter. One paragraph.

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"Mr. Walter: You are not being tried for anything. This is a congressional inquiry. It is not a trial. It seems to me you should be very glad to welcome the opportunity to clear the atmosphere so that you won't be blacklisted. There must be a reason. I don't know what you said. I

never knew there was another record. It is the first time I have seen you or heard of you. It seems to me this is your opportunity to clarify the atmosphere."

[fol. 129] Mr. Fanelli: Now, on Part 2, your Honor—

Mr. Hitz: Do you have a copy for—

Mr. Fanelli: I think his Honor has a copy of Part 2.

The Court: I haven't it before me. It's possible that one was turned over to me last night, and it may be in my—

The Witness: If you are not going to ask me to read it, I'd be very glad to hand my copy to the Court.

Mr. Fanelli: Very good, Mr. Tavenner.

(Witness hands exhibit to the Court.)

The Court: Thank you.

Mr. Hitz: Now, do I understand this is Part 2, or Government Exhibit 2?

Mr. Fanelli: No, it's Part 2 of Investigation of Communist Activities in the Dayton, Ohio, Area.

The Court: Now, has that been identified?

Mr. Fanelli: Part 3 of this is Government Exhibit No. 5, of these same hearings.

The Court: Is that the part that you refer to now?

Mr. Fanelli: No, we are referring to Part 2, your Honor, and introducing these particular sections in it of record, into the record.

The Court: All right.

Mr. Fanelli: But Part 3 of this same set is Government 5.

[fol. 130] The Court: Well, my point was, is Part 2, in its published form, marked for identification?

Mr. Fanelli: It is not, your Honor.

The Court: Well, don't you think it should be marked, then?

Mr. Fanelli: May we have it marked as proposed Defendant Exhibit No. 1?

The Court: Well, if you have no other exhibits, it will be marked for identification Defendant's Exhibit "A".

Mr. Fanelli: Defendant's Exhibit "A". Very well, sir.

The Clerk: For identification.

(Defendant's Exhibit No. "A", Witness Tavenner, was thereupon marked for identification.)

Mr. Fanelli: Now, in this proposed "A", at Page 6890, that part of that page beginning with Mr. Tavenner's statement in the middle, "She had been a Communist Party member," and down through the colloquy and ending with a statement by Walter, which begins, "It would seem to me," and to the end of Mr. Walter's statement. It's about the middle two-thirds of the page.

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"Mr. Tavenner: She had been a Communist Party member, I believe she testified, for a period of 21 years. I think that is probably all that is necessary to say by way of a general description leading up to the questions that I want to ask you.

[fol. 131] "During the course of her testimony she was discussing the situation which so frequently developed of a conflict between the interests of a union and the interests of the Communist Party. That was the general subject she was discussing at the time these questions occurred which I am now going to call to your attention.

"She was explaining how those things occurred and how in substance that the Communist Party was working for its own interests rather than for the real interests of labor.

"I would like to review a little of this testimony with you before asking you to testify on this same general subject.

"Mr. Walter: What was the woman's name?

"Mr. Tavenner: Barbara Hartle.

"Mr. Walter: This is the first I ever heard of her. Where is the woman now?

"Mr. Tavenner: She is at Alderson Federal Penitentiary.

"Mr. Walter: It would seem to me, after doing what she did, the least this committee could do would be to suggest to the Board of Pardons that she be released from her incarceration, particularly if she turned her back on this movement before she was convicted."

Mr. Fanelli: And on Page 6903, a statement by Mr. Clardy, it's about, it's one, two, three, four, five, six, seven, [fol. 132] eight, nine, ten, the eleventh line down from the top, just the line which he says, "We may have some questions to ask you after tonight's broadcast." And then the next line: "Mr. DeLacy: Fine."

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"Mr. Clardy: We may have some questions to ask you after tonight's broadcast.

"Mr. DeLacy: Fine."

Mr. Fanelli: Now on Page, the next page, 6904, a statement by Mr. Clardy, beginning the third line from the top of the page—it's very short—and reading: "No, we served it and brought you in now because of your unseemly actions this morning. Let me disabuse your mind of that."

"Mr. Clardy: No, we served it and brought you in now because of your unseemly actions this morning. Let me disabuse your mind of that."

Mr. Fanelli: And on Page 6918, the statement by Mr. Tavenner, as counsel for the committee, beginning, "Our records, of course as a result of testimony," etc., down to the end of that statement. It's down near the bottom of the page.

[fol. 133] "Mr. Tavenner: Our records, of course as a result of testimony, show your former membership in the Communist Party, and this is an opportunity for you to give the committee as full a statement as you desire about your membership in it, and your reasons for getting out of it, and anything that you desire to say to the committee I am sure will be heard by them."

Mr. Fanelli: On Page 6924, the three-line statement by Mr. Scherer, near the top of the page, it being the first time that Mr. Scherer speaks on that page: "If you had answered the questions," etc.

"Mr. Scherer: If you had answered the questions, and not invoked the fifth amendment, we would have let you say almost anything you want with reference to the activities in connection with that strike."

Mr. Fanelli: On Page 6926 and 27—and I want to get this specific, your Honor. Beginning with Mr. Tavenner's statement at the very bottom of 6926, which continues on to

Page 6927, and continuing with the colloquy down to the middle of the page, ending with Mr. Clardy's statement, "Then I take it you do not desire to say," etc., down to there on 6927.

[fol. 134] "Mr. Tavenner: Now, I asked you about your acquaintanceship with Roger Dunham and John Mitchell. The reason I did that is: Both of those persons have also identified you as a member of the Communist Party, and I want to give you an opportunity to state whether or not they told the committee the truth about it. You were identified by Mr. Mitchell as having been a member of the Communist Party, and also by Roger Dunham. Is there anything you want to say about it?"

"Mr. Markland: Is that a question, sir?"

"Mr. Tavenner: Yes, I am giving you the opportunity to answer sworn testimony in this record. You are here on the witness stand. I think you should have a chance to answer it if you want to.

"(At this point Mr. Markland conferred with his attorney, Mr. Prear.)

"Mr. Markland: As I understand the question, Have I anything to say on whether I know Mr. Dunham or Mr. Mitchell?"

"Mr. Tavenner: Not as to whether you know them. I told you they both identified you as having been a member of the Communist Party. This is an opportunity for you to explain it, deny it, or answer it in any way you choose.

"Mr. Markland: I think, under the circumstances, I haven't had the opportunity, nor has my counsel, to cross-[fol. 135] question these fellows in this situation; at least I haven't; I don't know about counsel. I think I will let it pass, sir.

"Mr. Clardy: Do you deny the identifications given by those witnesses?"

"Mr. Markland: Your question is, Do I deny? Again, sir, I will have to invoke the first and fifth amendments, particularly the fifth amendment.

"Mr. Clardy: Then I take it you do not desire to say through this record to the world, so to speak, anything in justification or in defense; am I correct in that?"

Mr. Fanelli: On Page 6949, the statement by Mr. Scherer to the witness involved there, which is very short, which is: "We will see that you keep your job."

The Court: To what witness?

Mr. Fanelli: To Mr. Marcum, who was testifying on that page.

The Court: All right.

Mr. Hitz: We don't object to that.

The Court: Received.

Mr. Fanelli: Now, on Government Exhibit No. 5, your Honor, which is Part 3 of these hearings—and we will be finished here in a few minutes—

[fol. 136] Mr. Hitz: Government 5 is the annual report, Mr. Fanelli.

Mr. Fanelli: Part 3 of these hearings— May we have this identified as Government's Exhibit "B", proposed Exhibit "B", your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit "B" for identification.

Mr. Fanelli: Thank you, sir.

(Defendant's Exhibit "B", Witness Tavenner, was thereupon marked for identification.)

Mr. Fanelli: At Page 6875—I'm sorry. This is a misreading of my handwriting. 6975, beginning at the top of the page with Mr. Tavenner's statement, and continuing with the colloquy through Mr. Tavenner's statement, "Do you desire to deny or comment upon his identification of you?" All of this right up at the top of 6975, about nine lines.

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"Mr. Tavenner: Mr. Levison testified before the Committee on Un-American Activities, on August 8, 1950, and during the course of his testimony admitted his own former Communist Party membership, and identified you as having been a member of the Communist Party during the same period of time which we have been discussing. Do you desire to deny the identification made by him or explain it in any way?"

[fol. 137] "Mr. Lorch: Your question was, do I deny the—
 "Mr. Tavenner: Do you desire to deny or comment upon his identification of you?"

Mr. Fanelli: At Page 6998, the second paragraph, beginning, "Of course, we have had no testimony," which appears in Mr. Clardy's statement at the very top of the page; second paragraph of that statement. Ending with, "We are talking about the dead past, thank goodness."

"Of course, we have had no testimony and we are not producing testimony here dealing with your college or the college that you attended, as of today. We are talking about the dead past, thank goodness."

Mr. Fanelli: All right. On Page 7013, the statement by Mr. Tavenner at the very top of the page, the first time Mr. Tavenner speaks on that page, beginning, "You have been identified—"

The Court: Received. Now, that should show that the question was directed to Mr. Romer.

Mr. Fanelli: Yes, sir.

The Court: Mr. Romer.

Mr. Fanelli: Yes.

[fol. 138] "Mr. Tavenner: You have been identified during the course of the testimony here by two witnesses, Mr. Arthur Strunk and Mr. Roger Dunham, as having been known by them to have been a member of the Communist Party. I am giving you this opportunity to deny it if it is not true; to explain it if it was true. Do you wish to take advantage of that opportunity?"

Mr. Fanelli: And at Page 7014, the statement by Mr. Tavenner a little above the middle of 7014, beginning, "Mr. Glatteman, you have been identified by two witnesses," etc., to the end of that particular statement by Mr. Tavenner, just above the middle of the page.

— "Mr. Tavenner: Mr. Glatteman, you have been identified by two witnesses during the course of the hearings here, Mr. Arthur Strunk and Mr. Roger Dunham, as having been

known by them to have been a member of the Communist Party. I want to inquire whether or not that testimony is correct, and if it is, I want to ask you various questions regarding your knowledge of Communist Party activities where you were so affiliated."

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[fol. 139] Redirect examination.

By Mr. Hitz:

Q. Mr. Tavenner, in 1954, particularly with reference to November of that year, did the House of Representatives have any rule with respect to how many members of a committee were necessary to comprise a subcommittee for the purposes of taking testimony?

A. Yes, sir, it did.

Mr. Fanelli: Excuse me. I am going to object to this, your Honor, as testimony out of the presence of the jury. Also I am going to object to it as not proper redirect.

The Court: Well, the latter, the first objection wouldn't be good if this goes to the question of pertinency.

Mr. Hitz: It does.

The Court: Does it?

Mr. Hitz: It does, and it is proper. It's an introductory question relating to the cross-examination of this witness.

The Court: Well, I will overrule it on the theory it's preliminary.

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By Mr. Hitz:

Q. Did the House of Representatives have a rule as to how many members of a committee were necessary to comprise a subcommittee for the purposes of taking testimony?

[fol. 140] A. Not at the time of the hearing in November, 1954.

Q. Did the House Un-American Activities Committee have such a rule for itself?

A. It did.

Q. What was the rule?

Mr. Fanelli: Excuse me one minute. I will object to that, your Honor. If there is a rule, let it be produced in court as the best evidence in this case. And also, your Honor, I renew my objection. I personally fail to see what this has to do with pertinency. This has to do with the constitution of the committee, and whether a quorum is present.

The Court: It does seem to me that it relates primarily to the latter issue.

Mr. Hitz: I'd say, I'm happy to have a chance to explain it. Mr. Fanelli had, at great length, undertook to show that there was a hearing in Dayton at which the defendant appeared earlier than his appearance in Washington, and that somewhat the same ground was covered by the committee; but that since the quorum was broken, there was no quorum, that it was determined by the committee that they would get this witness for contempt, but they couldn't get it then, and would get him in Washington at a subsequent time; therefore, that the Washington hearing lacked legislative purpose. It's going to that.

[fol. 141] **The Court:** I didn't recall that the cross-examination of this witness involved any such point. I thought that was the examination of the congressman which touched upon that.

Mr. Hitz: Well, I thought, I thought it was directed to this witness. I think it did.

Mr. Fanelli: The question of quorum was not taken up with this witness on direct-examination.

The Court: I didn't recall that it was. Now, if you want to reopen, we can pass upon that, or, I should say, have leave to present a new matter.

Mr. Hitz: No, I want redirect-examination of what I think was taken up with this witness.

The Court: Do you have in mind any specific testimony that this witness gave on that point?

Mr. Hitz: Yes, I do. "Wasn't much the same matter gone over in Dayton that was gone over subsequently in Washington? Why was the witness summoned to come to Washington?

"There was a broken quorum."

The Court: You may be right there, sir. I think I will let you proceed.

Mr. Fanelli: Your Honor, I have no objection to his proceeding on what he just stated; that is, whether the same matter was discussed.

[fol. 142] The Court: Very well.

Mr. Fanelli: But I didn't go into the question of how the committees were constituted and whether there was actually a quorum present or wasn't. I said, "You assumed that there was a quorum." That's all I said.

The Court: Well, we will pass upon whether it's related matter or not when we get in it further.

Mr. Hitz: This is still preliminary to my point.

The Court: Proceed.

By Mr. Hitz:

Q. Did the Committee on Un-American Activities have such a rule for itself?

A. Yes, sir, it did.

Q. Were you present when the rule was enacted?

A. Yes, sir, I was.

Q. When was it enacted?

Mr. Fanelli: Your Honor, I'd have an objection to this as not being the best evidence. If a rule was enacted, I think it ought to be produced.

The Court: Well, overruled at this time.

Mr. Fanelli: All right, sir.

By Mr. Hitz:

Q. When was the rule enacted?

A. It was enacted at a meeting, an executive meeting of the Committee on Un-American Activities held in March of 1954, at which I was present.

[fol. 143] Q. Yes, sir. And what was the enactment?

A. A motion was made and unanimously carried, that a subcommittee of the Committee on Un-American Activities should consist of three members, and any two of whom were authorized to receive evidence at a hearing, receive testimony.

Q. I see.

Mr. Hitz: Now, your Honor, that answer to my question is offered for two purposes: One is it is preliminary in line of redirect-examination going to the particular subject that was taken up on cross, that I have already indicated, and in addition we offer it as testimony in chief bearing upon the power of the committee to sit in subcommittees, which we believe to be a question directed to the Court rather than to the jury, for the reason that we believe the jury should be instructed on this subject that if they find that the chairman appointed the three persons concerning whom there is testimony here to comprise a subcommittee, that that would be a valid appointment of a subcommittee. In other words, that your Honor will pass upon the method of and the validity of the method of appointment. The jury will pass upon the fact of appointment.

The Court: Do you conceive that if there is a question of fact concerning the rule as to the constitution of subcommittees that it still is purely a question of law?

[fol. 144] Mr. Hitz: As to the validity of the acts that constitute the appointment, we think—

The Court: I am not talking about that. I am talking about whether there is, as this witness says, a rule adopted. In all events, does that involve a question of law only?

Mr. Hitz: Yes, I think it does.

The Court: For the Court?

Mr. Hitz: I think so and then there will be the testimony given by Mr. Scherer that there was a designation of himself and two others, which is a fact question for the jury to determine "is that true?" That was the charge that was given, your Honor. Your Honor will recall in the Lawson and Trumbull cases. The judges in those cases charged that if they believed beyond a reasonable doubt that the then chairman designated certain named persons to comprise a subcommittee, that would be a valid subcommittee; the latter part of that charge being a finding of law by the Court, and a direction to the jury to so find if they believed the fact of appointment.

The Court: Well, I am going to permit you to proceed. I am not finally passing upon the point you contend for.

Mr. Hitz: Yes, sir.

The Court: Proceed.

Mr. Fanelli: Excuse me.

[fol. 145] The Court: Yes.

Mr. Fanelli: I'd merely like to state our position, and object to proceeding in the absence of a jury on this line of testimony.

The Court: Yes. Well, if there is something to go to the jury that is developed here, there is no harm in my hearing it at this point going to the question of only law involved.

Proceed.

Mr. Fanelli: Well, I do want to make it clear for the record that it is our position it's a factual question, in any event, which may become a question of law for your Honor in terms of directing a verdict, but it's not otherwise a question of law.

The Court: All right.

By Mr. Hitz:

Q. Mr. Tavenner, what was the practice with respect to who should appoint persons from the committee to comprise subcommittees?

Mr. Fanelli: I will object to that.

Mr. Hitz: (Continuing) In 1954?

Mr. Fanelli: Excuse me, your Honor. I don't think that's competent testimony here on what the practice was. They don't get a power to appoint a committee, or appoint one validly, because they always do it in a way that is invalid.

The Court: That objection is overruled, as stated. There [fol. 146] may have been some question about whether there's any foundation for the question now, since it's not been testified that he knows the practice, but that objection hasn't been made.

Mr. Hitz: No.

Mr. Fanelli: Excuse me. I wouldn't object if there is a practice. I'm sure Mr. Tavenner would know what the practice is.

The Court: All right.

By Mr. Hitz:

Q. Was there a practice of the committee with respect to who should be the one to designate members of a subcommittee?

A. Yes, sir.

Q. Who was that person?

A. The chairman of the committee.

Q. Was there any House rule, any rule of the House of Representatives, with respect to who should be the one to appoint members of a subcommittee?

A. No, sir.

Q. Silent on that subject?

A. Yes, sir.

Mr. Hitz: I may say, so that, of course, the questioning is clear to the Court, and the record, that we offer that last bit of testimony from Mr. Tavenner on the second of the two subjects that we last discussed; namely, on the power and authority of the chairman to appoint a subcommittee. We will then offer the jury testimony. In fact, we have done so from Mr. Scherer, that there was actually a designation pursuant to what we believe to be legal [fol. 147] authority, and which we will ask the Court to charge was legal authority, consequently a valid committee, if the fact of designation is found by the jury.

Mr. Fanelli: We object to that offer as irrelevant, incompetent and immaterial.

The Court: Overruled.

The Witness: May I further explain my answer as to the practice of the committee in appointing chairmen of subcommittees?

By Mr. Hitz:

Q. Yes, if you haven't finished it, you may.

A. At the beginning of the 1953 session of the Eighty-Third Congress, which was the congress during which this witness was subpoenaed to appear, authority was given by unanimous vote of the committee to the chairman to appoint subcommittees.

Q. I see. By the way, Mr. Tavenner, was express authority in the hands of the Un-American Activities Committee to act through subcommittees?

A. Yes, sir.

Q. Found where?

A. The Public Law 601, as well as the rules adopted by the House at the beginning of each session of congress since 1946.

Mr. Fanelli: I will object to that and ask that it be stricken. It's purely a legal matter for argument by counsel.

The Court: Well, I think that the first part of it is, at [fol. 148] least. I am going to receive it in that light.

Mr. Fanelli: I will withdraw my objection.

The Court: All right.

By Mr. Hitz:

Q. Is that Public Law 601 published on Page Roman V of Government No. 3, which is Ohio—Part 1?

A. I do not have that exhibit before me.

Mr. Fanelli: We will concede that it is, your Honor.

The Court: Well, it's also published in one of the exhibits—

Mr. Hitz: It is.

The Court: (Continuing) —that was received prior to that, to that time.

The Witness: It is supposed to be at the beginning of each of those exhibits.

The Court: Yes.

By Mr. Hitz:

Q. Now, Mr. Tavenner, taking you to the first appearance before this committee of Mr. Russell, which took place in Dayton, Ohio in—when was that?

A. September 15, 1954.

Q. September 15th, '54, you have been cross-examined with respect to the scope of your questioning of Mr. Russell, and it is my understanding that you said that you did not cover all of the subject matter in those questions

that you had in mind, and intended to question him about. Let's get back to that testimony.

[fol. 149] Mr. Fanelli: I will object to that. This witness' understanding is irrelevant to this proceeding. The record will show what he answered to that question.

The Court: Preliminary. Overruled.

By Mr. Hitz:

Q. Mr. Tavenner, at what time— Well, first of all, how many members of the committee were comprising the subcommittee that was hearing witnesses that day in Dayton?

A. Three members.

Q. And of those three, then, two could be a quorum, is that right, sir?

A. Yes, sir.

Q. At what time did the subcommittee of three become a subcommittee of one?

A. At the close of the morning session of that day, the 15th of September.

Q. So that in the afternoon session, it did not meet the committee's "quorum requirement", is that correct, sir?

A. That is correct.

Q. Now, Mr. Tavenner, your committee at that time had its, the sanctity of its testimony and its hearings protected by the criminal statute against perjury; correct, sir?

A. Up until the afternoon session.

Q. No, I am speaking generally. Your hearings were protected generally, the sanctity of them, against perjury by the statute against perjury; correct?

A. Yes, sir.

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[fol. 150] By Mr. Hitz:

Q. The sanctity of the hearings and the testimony taken generally before the committee was likewise protected by the contempt statute, right?

A. Yes.

Q. Having in mind the Cristovo case, the Cristovo perjury case— By the way, you are familiar with the case?

A. Yes.

Q. When you broke off the questioning of Mr. Russell earlier than you had otherwise intended to do, as you have said, did you have in mind that your "committee" or "sub-committee" had lost the protections of perjury and contempt that surrounded its hearings when a quorum was present?

A. I did.

Q. Did you have in mind that part of the function of the committee to legislate was to investigate on matters in which it could legislate?

A. Yes, sir.

Q. That part of the duties of the committee were to obtain testimony and obtain it under oath.

Mr. Fanelli: Excuse me.

A. That's correct.

Excuse me.

Mr. Fanelli: Your Honor, I think we are beyond the preliminary point. Mr. Hitz is going to testify at this point.

The Court: I concur. I think that the questioning is leading and suggestive. I think the counsel can call the witness' attention to certain considerations.

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[fol. 151] By Mr. Hitz:

Q. Mr. Tavenner, what was your then understanding of the duties of the committee with respect to the taking of testimony pursuant to its legislative function under oath?

A. Well, it had been the— It was considered the duty of the committee, and it had been the practice of the committee, in making reports to congress, to base it upon sworn testimony. Many times the committee would receive information, but before taking the responsibility of acting upon it it would require it to be put in the form of sworn testimony, except where organizations and individuals were invited to make general statements regarding provisions of a law which the committee had referred to it by the Speaker of the House to conduct hearings of that type.

Q. I see.

A. And I think even then, in some cases, testimony was required to be sworn to.

Q. Was it your then understanding that testimony given by witnesses both reluctant and friendly would be influenced or not by the ability to prosecute them for a violation of their oath?

A. Unquestionably.

Q. You have stated that of the three members of the committee that comprised the subcommittee for that morning session, only two were present during the morning. Were the three there at any time?

A. Mr. Walter was required to leave the hearing, and I [fol. 152] cannot recall from, without attempting to refresh my recollection, whether he left early in the morning of the last days, or day, or whether he left on the second day. I am inclined to believe he left on the second day, so that there were no more than two there at any time on the 15th of September.

Q. And at what time did the subcommittee of three dwindle down to a so-called subcommittee of one?

A. Mr. Clardy, a member of the committee, had his plane reservation for early afternoon, and he reluctantly stayed until the last minute that he could stay and still make his plane, and my recollection is that I induced him to stay until sometime after 1:00 o'clock—the transcript of testimony will show the exact hour—so that we could get all the witnesses heard while the committee could act as a valid committee. And due to Mr. Clardy's inability to stay longer, we could not complete the testimony of the witnesses who had been subpoenaed.

Q. Did you take any of the testimony of Mr. Russell before it came time for Mr. Clardy to leave?

A. No, sir.

Q. Because Mr. Russell testified at what time?

A. Shortly after 2:19 p. m.

Q. Mr. Clardy had already left, had he?

A. Yes, sir. I should add in that connection that we had heard that there were several witnesses, several persons who had not been subpoenaed as a witness, who would [fol. 153] like to appear before the committee. We were

unable to hear them, although one did appear after the hearing had been closed in the afternoon, and the hearing was reopened again for that purpose.

Q. Which witness is that?

A. The last witness, whose name, I believe, is Williamson.

Q. All right, sir. When Mr. Russell was called, did you have any expectation that he would be a cooperative witness and give testimony?

Mr. Fanelli: Excuse me. Counsel, would you tell us specifically as to which appearance?

Mr. Hitz: I'm sorry. I'm still on the Dayton appearance.

A. Yes, sir; I thought so. It had been the subject of staff discussion. I may have been the only member of the staff who thought so, but from information I had I thought he would.

By Mr. Hitz:

Q. What is the reason why, after the quorum was broken and the subcommittee was no longer a validly-operating subcommittee, that you nevertheless called Russell?

A. Well, I thought there was the prospect of his being willing to cooperate with the committee, is one reason that I'm certain that the chairman of the subcommittee decided to proceed, notwithstanding the fact that it was not a valid subcommittee.

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[fol. 154] By Mr. Hitz:

Q. Mr. Tavenner, were you aware in September and November, 1954, of the wishes of the committee with respect to Communist infiltration of Antioch College in any period?

A. Yes.

• • • • •

By Mr. Hitz:

Q. As to any period. Your answer is yes, or no, or what is it?

A. Yes.

Q. How did you come upon that information concerning the committee's wishes?

A. By discussing it with the committee, and at a committee meeting.

Q. With respect to what period of time did the committee have that interest? Do you understand my question?

A. Yes, I do.

Q. It's with respect to what time did it have the interest.

A. And I'm having difficulty in recalling the time element.

Q. Can you approximate the time concerning which the committee had that interest? If you can't, say so, and we will move on, Mr. Tavenner, because I have some more questions that may help you.

A. I cannot independently recall the discussion of the time element.

Q. I will see if I can ask you—

A. At the moment, I cannot.

Q. I will see if I can ask you some direct questions that may help you. Did the committee have public testimony with respect to the existence of a Young Communist League group on the campus in the early 1940's?

[fol. 155] **Mr. Fanelli:** I am going to object to that question as leading. Now, we are going to have a process in which he's going to tell the witness what the answer to this question is.

Mr. Hitz: It's a direct question. When he's exhausted his recollection, I can ask him a direct question.

The Court: It is leading. I don't think it's such a matter that there would be prejudice from it. I will permit the question.

A. I cannot say definitely at this time, without further thought, as to when the committee first learned of the existence of a Young Communist Party group, Young Communist League group on the campus at Antioch, but I believe, I'm reasonably certain that it was prior to August

the 9th, 1954, when the committee made its decision to embark upon these hearings.

By Mr. Hitz:

Q. Mr. Tavenner, I am not asking you when the committee received the testimony. I am asking you as of what time it had the testimony. It's a different question. Did it have that testimony as of the time, approximately '40 and '42, the V.C.L. had infiltrated the campus?

A. Well, it received that testimony during the hearings at, at Dayton.

[fol. 156] Q. I am not going to ask you whether you understand the question, because it's clear to me you do not. And perhaps I haven't framed it properly. I am not asking you when the information was obtained by the committee; I am asking you what time it's related to.

A. Oh, pardon me for not understanding. Yes. The committee did have the information relating to the existence of a Communist Party, Young Communist Party League group at Antioch College.

Q. In what period?

A. In the neighborhood of 1942.

Q. Was that information in the form of public testimony, sir?

A. Yes.

Q. Did the committee have public testimony concerning a later period of time during which there had been a group of persons that were not Young Communist League members but Communist Party members connected with the Antioch College?

A. Yes, sir.

By Mr. Hitz:

Q. As of what period of time, and relating to what period of time, did the committee have such testimony?

A. 1945; the latter part of 1945 and the early part of 1946.

Q. Was there any other period of time than those two

periods of time, one involving around 1942, and in the Young Communist League, the other involving '45, and thereabouts, in the Communist Party, was there any other time that the committee was desirous of obtaining similar information?

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[fol. 157] A. Yes, sir.

By Mr. Hitz:

Q. What is that period of time that the committee had that wish?

A. The committee was very anxious to establish the missing link between 1942 and 1945. Witnesses had testified that there was no member of the faculty at the institution connected with the Young Communist League group in 1942. The sworn testimony of Dr. Metcalf had been that in the latter part of 1945 and 1946 he and other members of the faculty and the student body were members of the Communist Party branch or cell at Yellow Springs, which is the place of location of Antioch College. The testimony had shown that the organizer, the functionary of the Communist Party, John Reed, had followed up some of the students who had been in the Young Communist League group, and later got them into active party work in important places. We were endeavoring to follow up that same line of testimony between 1942 and 1945.

Q. Tell us whether or not the desire of the committee to obtain such information existed in November, 1954.

A. Yes, sir.

Q. Did that play any part in the desire of the committee, so far as you were aware of that desire, in calling Norton Anthony Russell in November, '54?

A. Yes, sir; it was part of the reason for calling him.

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[fol. 158] Recross examination.

By Mr. Fanelli:

Q. Mr. Tavenner, do I understand, or is it a correct summation of the testimony you have just given on direct,

that the committee recalled Mr. Russell in Washington so as to have him testify under the protection of the perjury and contempt statute?

A. There was a distinct feeling on my part, which I reported to the committee, that this witness, at Dayton, may have been influenced by the fact that it was, that the committee was not a legally-constituted committee, and for that reason, if called before the committee, might cooperate with the committee. And I had hopes of his doing so until he was put on the stand here in the city of Washington.

Q. Now, Mr. Tavenner—

A. And—

Q. Excuse me. I didn't mean to interrupt. Go ahead.

A. Yes. And that was the reason that I broke off in my questioning of him in September, and the reason why I fully expored it in Washington.

Q. All right. Now, Mr. Tavenner, to touch upon another subject of your redirect-examination, of what importance to any legislative question before your committee in 1954 was the existence or non-existence of a Communist group on the campus of Antioch College from 1942 to 1945 in circumstances where, as you testified, you were satisfied that there was such a group before '42 and after '45? I will have that read to you if it's too long.

A. No, I understand.

[fol. 159] Q. All right, sir.

A. As I said earlier in my testimony, we were unable to subpoena Reed, the functionary, who organized this group at Antioch College. It was of importance to the committee to know the plan and understand how the Communist Party was operating at that particular school, as well as other schools. It was of importance to the committee to know that young people brought into an organization like the Young Communist League would be followed into later life and brought into positions in the U. E., a labor union, of which there were several instances developed in the course of this testimony. The committee did want to know about Lohman, whose name I do not recall, first name, but who was then being prosecuted on a charge of perjury, I believe, in connection with his taking, giving

of what is known as the Taft-Hartley Non-Communist Affidavit, and who was employed in the plant with Mr. Russell. We did not call Mr. Lohman himself, because of that pending litigation.

We had been studying since August, 1949, the infiltration of Communism among the leadership of the United Electrical, Radio and Machine Workers of America. We had heard evidence during this hearing regarding one witness, Bebe Ober.

Q. Now, I think we have gone far beyond the answer to my question.

A. Well, I am explaining what you asked me to explain.

Mr. Fanelli: I asked about Antioch College, '42 to '45, your Honor please, and I'm getting the United Electrical Workers—

[fol. 160] The Witness: It's all related.

Mr. Fanelli: Go ahead.

The Court: It's a rather broad question, to ask why, and I—

Mr. Fanelli: All right, sir. I will withdraw my comment.

The Court: I will ask the witness to hold his answers responsive.

Mr. Fanelli: Try to keep it responsive.

The Court: And I assume the intent is to do that.

A. Several of these young people who were members of this group in Antioch College became prominent in the work of the U. E. The committee was in the process then of investigating other members of that group whose names were not made public, and whose names would not be made public unless, in a public hearing, unless there seemed to be some very active Communist Party activity on their part, all related to this same group of the Communist Party. We had found the period where members of the faculty were members of the Communist Party, but could not, could not close the gap between 1942 and 1945 to determine what happened. Had we been able to do so, it would have more fully explained the purposes of the Communist Party, and its method of operation, so that this committee would have been in a better position to, it would have increased its over-all information so that it

could have been in a better position to intelligently recommend legislation.

[fol. 161] Along with it was the witness' employment at Vernay Laboratories, which was virtually a subsidiary of Antioch College, according to my recollection.

.

FRANK S. TAVENNER returned to the witness stand and testified further as follows:

Further redirect examination.

By Mr. Hitz:

Q. Mr. Tavenner, did the committee take any action with respect to authorizing the Dayton investigation and hearings to be conducted? Just answer it they did or they did not.

A. They did.

Q. Were you present when the action was taken?

A. Yes, sir.

Q. Will you tell us where it took place?

A. It took place in the room in which the executive meetings of the committee usually are held, in the Old House Office Building in Washington.

Q. When did it take place?

A. On August the 9th, 1954.

Q. What action was taken?

A. Action was taken directing that the hearings be conducted and held in Dayton at any time that they were ready for hearing between the present time, speaking as of August the 9th, and three weeks prior to the fall election.

Q. Now, of the matters that were entrusted to the committee for investigation, was any particular subject singled out for the Dayton hearings in this authorization meeting?

A. No, it was not.

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[fol. 162] By Mr. Hitz:

Q. Are you familiar with any practice of the Un-American Activities Committee, during your period as counsel for

it, with respect to how and who appoints subcommittees?

A. Yes, sir.

Q. In whom has been vested the authority to appoint subcommittees during this period?

A. The chairman of the committee.

Q. And what is the period about which you speak?

A. I speak of personal knowledge from May, 1949, to the present day.

Q. Yes, sir. Now, are you familiar with any practice with respect to how the appointment of subcommittees is made by the chairman?

A. Yes.

Q. What has been the practice with respect to how subcommittees were appointed?

A. The chairman— The practice has been for the chairman to interview members of the committee personally, or by telephone, or by letter.

Q. Has it ever been the practice to inform you, for the chairman to inform you as to who shall be on a subcommittee, and you informed the member?

A. It has occurred that the chairman has called me and told me to get in touch with certain individuals and advise them that he wanted them for, to serve on a particular subcommittee, and to advise him whether or not they would be available to serve.

Q. Now, you have testified that you were present at a meeting of the committee in March, 1954, at which action [fol. 163] was taken by the committee with respect to the number of persons who shall comprise subcommittees.

A. Yes, sir.

• • • • •

By Mr. Hitz:

Q. Mr. Tavenner, who of the committee was present at the time that this action was taken by the committee? Can you tell us how many members were present?

A. I think I can. All of the committee members were present with the exception of three. Those individuals not present were Congressman Carney, Congressman Clardy, and Congressman Doyle. The remaining members

of the committee, consisting of six, whose names I can give if needed, were present.

Q. I'd like to ask you this direct question: Was Congressman Moulder present or absent?

A. No, Congressman Moulder was not present.

Q. And I will then ask you was Doyle present or absent?

A. Congressman Doyle was present.

Q. All right. So that your—

A. Yes.

Q. (Continuing) —your testimony, then, would be who was absent? Recite again who was absent, with that correction.

A. There were three absent.

Q. Yes, sir.

A. Congressman Carney, Congressman Clardy and Congressman Moulder.

Q. I see. And all the others were present?

A. Yes, sir.

[fol. 164] Q. That is, of the nine, there were six present?

A. Yes, sir.

Q. What was the action taken?

A. The action taken directed that subcommittees of the committee, in the conduct of hearings, should consist of three members, any two of whom would constitute a quorum, to transact, to conduct a hearing.

Q. I see. Now, you say that the action was taken. And this is really what I am trying to get at in today's testimony: Tell us in what way the action was consummated.

A. Chairman Walter—he is presently the chairman—but Mr. Walter, then a member of the committee, made the motion.

Q. An oral motion or a written motion?

A. An oral motion.

Q. What action was taken on his oral motion?

A. It was unanimously adopted.

Q. And by "adopted," do you mean there were votes in favor of that and none against it?

A. That is correct. I was present, and heard it and observed it.

Further recross examination.

By Mr. Freehill:

Q. Mr. Tavenner, when the committee as a whole meets in executive session, do you have a stenographer take minutes?

A. No. No, the person who writes the minutes takes notes and prepares the minutes, which is usually the clerk. [fol. 165]

Q. Now, you say that the committee met on August 9, 1954, and authorized hearings in Dayton?

A. Yes, sir.

Q. Who were present?

A. All but two of the members. Excuse me just a moment. All were present with the exception of two. Those two persons were General Carney, Congressman Carney, I should have said, and Congressman Doyle.

Q. Mr. Tavenner, how many series of hearings in 1954 did the committee have?

A. I have never counted them. I could state where the major hearings were conducted.

Q. Could you say that there were dozens of hearings?

A. Well, sometimes a hearing consisted of just bringing before the committee one or two individuals, without relationship to a particular area. And there'd be no way for me to even guess as to the number of hearings of that type. But the number of major hearings, area hearings, as we refer to them, such as those conducted at Albany, and at Seattle, Milwaukee—I believe Milwaukee was in 1955, however—I do not believe there would have been as many as a dozen.

Q. I have in my hand here an annual report of the Committee on Un-American Activities for 1954, and I note that this report indicates that during the year, either in public or executive session, you—

Mr. Hitz: I can't hear you, Mr. Freehill.

By Mr. Freehill:

Q. Either in public or executive session there were some [fol. 166] six hundred witnesses before the committee; is that right?

A. I'm sure that must be right.

Q. Now, with the series of hearings that you had, and all these witnesses, can you be clear as to what happened on August 9, 1954?

A. Not without refreshing my recollection, I probably would not remember all the details of it.

Q. You were not present when any telephone call was made to Mr. Scherer.

A. No, I was not.

Q. You don't know how the chairman appointed the subcommittee in August or September, 1954—or November, I should say.

A. Yes, sir, I do. The subcommittee was appointed, and a subcommittee was announced in the course of the executive hearing which occurred on August the 9th. And the three members who served as that subcommittee were appointed at that time.

Q. How many members?

A. Three. The chairman appointed the committee immediately upon the, upon the committee taking action to go into the Dayton hearings.

Q. And those three were—

A. Those three were—

Q. You may have said this. I may have missed it.

A. No, I did not say. The three persons who were appointed on August the 9th to serve as a subcommittee consisted of Congressman Gordon H. Scherer, as chairman, Congressman Kit Clardy, and Congressman Francis E. Walter.

[fol. 167] Q. Now, with respect to this meeting in March of '54, do you have the minute of that meeting?

A. No, I do not.

Q. Do you know where it is?

A. Yes, sir.

Q. Where is it?

A. It's in the files of the committee.

Mr. Freehill: That's all, your Honor.

Mr. Hitz: That's all, Mr. Tavenner. Thank you.

I wonder if you'd stay with us in the witness room.

The Witness: Yes, sir.

Mr. Hitz: Thank you.

And will you call Mr. Barnes, please.

Your Honor, this is testimony that we offer to the jury, now, to follow.

The Court: All right. We will call the jury in.

(At this time the jury returned to the courtroom and the following occurred in the jury's presence:)

The Court: The jury is in the box. You may proceed.

• • • • •

FRANK S. TAVENNER recalled to testify as a witness in behalf of the plaintiff, being previously duly sworn, was examined and testified further as follows:

• • • • •

By Mr. Hitz:

[fol. 168] Q. However, would you be good enough to read us the commencement of those proceedings at 2:19, as they are contained in the official record?

A. Yes, sir. (Reading.)

"Afternoon Session. (At the hour of 2:19 p. m., of the same day, the hearing was resumed, the following committee members being present: Representatives Kit Clardy, (Presiding), Gordon H. Scherer, and Francis E. Walter. (Appearances noted in transcript).

"Mr. Clardy: The committee will be in session.

"Let the record show that the Chairman has appointed a subcommittee consisting of Congressman Scherer, Congressman Walter and myself.

"Congressman Walter will be here as soon as the conference he is engaged in will permit him to be present.

"Congressman Scherer and myself constituting a majority of the subcommittee, are here and now ready to resume."

By Mr. Hitz:

Q. Now, let me interrupt a moment. Are Congressman Clardy, Scherer and Walter the same members of the

Un-American Activities Committee which you state were appointed by Chairman Velde on August the 9th, 1954, at the time that the full committee authorized taking hearings?

A. They are, yes.

[fol. 169] Q. All right. Will you turn to that page which commences the testimony of Mr. Russell, tell us what it is, and then read it?

A. After the chairman of the subcommittee excused Mrs. Baumkel from the witness stand—

Q. Spell that name for us.

A. B-a-u-m-k-e-l.

Q. All right, sir. Then what happened?

A. He stated, "Will you call your next witness?" The next witness was Mr. Russell.

Mr. Hitz: Now, I think we can pick up and follow Mr. Tavenner and the official record on Page 5 of the typewritten, of the typewritten copy which I have furnished the Court and counsel, being a copy of the committee report.

Q. But will you read from the official hearings?

A. Yes, sir.

(Reading.)

"Mr. Tavenner: Mr. Anthony Russell, will you come forward, please?

"Mr. Clardy: Raise your right hand.

"You do solemnly swear the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

"Mr. Russell: I do.

"Mr. Clardy: Be seated.

"TESTIMONY OF NORTON ANTHONY RUSSELL.

[fol. 170] "Mr. Russell: May I ask the photographers be directed not to take pictures during the testimony, please?

"Mr. Clardy: Yes. Get your pictures before he commences to testify.

"Mr. Tavenner: What is your name, please?

"Mr. Russell: Norton Anthony Russell.

"Mr. Tavenner: When and where were you born, Mr. Russell?

"Mr. Russell: In New Haven, Connecticut, in 1918, November 12th.

"Mr. Tavenner: Are you married?

"Mr. Russell: Yes.

"Mr. Tavenner: What is your wife's name?

"Mr. Russell: Marjory.

"Mr. Tavenner: What was her name prior to marriage?

"Mr. Russell: Marjory Stewart.

"Mr. Tavenner: Had you been married previous to that?

"Mr. Russell: Yes; I had.

"Mr. Tavenner: Will you tell the committee, please, what your educational training has been, that is, your formal educational training.

"Mr. Russell: I graduated from Antioch College with a Bachelor of Science Degree.

[fol. 171] "Mr. Tavenner: What was the year of your graduation?

"Mr. Russell: I received my degree in 1942.

"Mr. Tavenner: Will you tell the committee, please, what your record of employment has been since graduation in 1942, including the period when you were in the Armed Forces?

"I believe you were in the Armed Forces?

"Mr. Russell: No, sir; I was not.

"Mr. Tavenner: You were not?

"Mr. Russell: I worked for a short time. I believe it was during 1941 at the Brown and Brookmeyer Company in Dayton.

"(At this point, Representative Moulder entered the hearing room.)"

By Mr. Hitz:

Q. Now, may I interrupt to clear something up? Mr. Moulder was not a member of the subcommittee, was he?

A. No, sir.

Q. Of this particular subcommittee.

A. No, sir.

Mr. Freehill: Your Honor, I object to this as leading, and ask it be stricken.

The Court: It was leading.

Mr. Hitz: I will withdraw it.

By Mr. Hitz:

Q. Was Mr. Moulder a member of the subcommittee?

A. No, sir, he was not.

[fol. 172] Q. Was he a member of the committee?

A. Yes, sir.

Q. All right, sir. And you are reading now without omission, are you, sir?

A. Yes, sir. (Continuing)

"Mr. Russell: I worked from early '42 until I believe it was 1948 for the United Aircraft Products Corporation in Dayton, and I have been employed at Vernay Laboratories in Yellow Springs since that date.

"Mr. Clardy: Mr. Reporter, let the record show the entrance of Mr. Moulder at this point.

"Mr. Tavenner: I would like to go back now to the period of your collegiate training at Antioch College.

• • • • •
"While in attendance at Antioch College, were you acquainted with John Ober?

"Mr. Russell: Yes. I knew John Ober.

"Mr. Tavenner: Were you acquainted with a person whom he later married, Bebe Ober?

"Mr. Russell: Yes; I was.

"Mr. Tavenner: Both of these individuals have testified before this committee and have advised it, in public session, that there was, during the period they were at Antioch College, or a part of the time they were there, a group or cell of the Young Communist League.

[fol. 173] "They have told us that that Young Communist League was organized and activated and conducted by a person who was not in any way connected with Antioch College, a person by the name of Herbert Reed.

"They have advised us that Herbert Reed was an organizer for the Communist Party in the Dayton area, though not at Yellow Springs, which is the seat of Antioch College.

"You were acquainted with Herbert Reed, were you not?

"Mr. Russell: Yes; I was.

"Mr. Tavenner: When did you last see Herbert Reed?

"Mr. Russell: I really don't remember.

"Mr. Tavenner: Do you know where Herbert Reed is now?

"Mr. Russell: No, sir, I do not.

"Mr. Tavenner: Approximately how long ago was it that you last saw Herbert Reed?

"Mr. Russell: It would have been several years. I don't remember.

"Mr. Tavenner: By several do you mean two or three?

"Mr. Russell: More than that; many more.

"Mr. Tavenner: Four or five?

"Mr. Russell: I would say—

"Mr. Tavenner: I am not trying to pin you down to an exact time—

[fol. 174] "Mr. Russell: Yes.

"Mr. Tavenner: —but I would like to know approximately when it was.

"Mr. Russell: Possibly in the mid-forties.

"Mr. Tavenner: The mid forties?

"Mr. Russell: Yes.

"Mr. Tavenner: What was the occasion for your seeing him at that time?

"I assume that means about 1945 or 1946?

"Mr. Russell: Or '44, or—

"Mr. Tavenner: '47?

"Mr. Russell: Or '43 or 7. I don't remember.

"Mr. Tavenner: All right.

"What was the occasion for your seeing him at that time?

"Mr. Russell: I believe I will decline to answer that question on the same grounds that I declined to answer similar questions at the public hearing in Dayton. That is, Mr. Tavenner, it is my belief that the First Amendment to the Constitution, as well as the spirit of the whole Bill of Rights, protects me against being forced to disclose any information about my opinions and political beliefs and associations.

"Mr. Tavenner: Well, now—

"Mr. Clardy: Pardon me, Mr. Tavenner. May I inquire or ask him a question there?

[fol. 175] "I am not sure I understand.

"I know at the Dayton hearing you did raise the First Amendment, but are you going beyond that?

"To be specific, are you raising the Fifth Amendment?

"Mr. Russell: No; I am not.

"Mr. Clardy: Well, may I, since you are not accompanied by an attorney, be of a little assistance to you and suggest that, under court decisions and under the rulings you do not have an umbrella of protection in the First Amendment at all.

"What you are saying to us, in substance really, is that you can not in good conscience tell us anything about an unlawful conspiracy that would destroy us.

"I wish you would search your conscience a little more thoroughly and cooperate with your government and this committee and help us as much as you can, and I am telling you this in all kindness because you will discover, if you will read the cases, if you will talk with any attorney in the land who knows anything about constitutional law, the First Amendment has never been and will not be a protection against any action the committee may take; and, because you are cooperating otherwise, I hope you will not put us in an impossible position.

"I don't want to see any harm done to you.

"I ask you to reconsider and give us the answer to that question.

[fol. 176] "Now, will you proceed, Mr. Tavenner?

"Mr. Tavenner: Yes.

"I would like to point out to you, before you answer that question, the committee knows from the testimony of John Ober and Bebe Ober of Herbert Reed's connection with the Young Communist League Group at Antioch up to 1942.

"The committee has the testimony of Professor Metcalfe that he was a member of a group of the Communist Party in the mid-forties.

"Mr. Scherer: '46.

"Mr. Tavenner: In '46, and I believe in '45—'45 or '46—he says at the end of '45 and the beginning of 1946.

"Now, there is an important link in between. The actual organizers in 1945 are not known. You may be in a position to supply that information to the committee.

"We know what it was in '42. We are asking you now to supply the missing link to that testimony, as far as you are able to do it, from your own knowledge.

"With that explanatory statement, I would like to ask you again to tell the committee what was the occasion of your seeing Herbert Reed in the mid-forties?"

• • • • •

"Mr. Russell: You realize, I think, that I didn't live in Yellow Springs at that time.

[fol. 177] "Mr. Tavenner: Well, let's clear that up. _____

"Mr. Clardy: I didn't hear you.

"Mr. Russell: I say I was not living in Yellow Springs at that time.

"Mr. Tavenner: No. You returned?

"Mr. Russell: But perhaps to answer your question—

"Mr. Tavenner: You returned there in 1948?

"Mr. Russell: Perhaps it was '48; yes. I still refuse to answer the question on the grounds I stated previously.

"Mr. Scherer: That is the First Amendment only?

"Mr. Russell: Yes; that is correct.

"Mr. Scherer: You are not invoking the Fifth Amendment?

"Mr. Russell: No; I am invoking the protection of the First Amendment, to protect my individual's rights against being forced to disclose any information on my opinions or associations.

"Mr. Tavenner: Now, Mr. Russell, I explained to you fully when you took the stand in the previous hearing that you were entitled to counsel.

"I failed to do that when you took the stand a few moments ago. I want to make it plain right now you have the right to have counsel with you or to consult counsel.

"Mr. Russell: I understand that.

[fol. 178] "Mr. Tavenner: I think you have understood that all along, have you not?

"Mr. Russell: Yes.

"Mr. Tavenner: And if you want advice of a legal character, don't hesitate to indicate your desire.

"Mr. Russell: Okay.

"Mr. Tavenner: The committee has also received testimony that Bebe Ober, who took part in this Young Communist League activity in Antioch College upon completion of her course obtained a position with a local union in Dayton, and she was then approached by this same man, Herbert Reed, and brought into the Communist Party itself after taking that employment.

"Now, in the course of her testimony, Mrs. Ober did not attempt to blame Reed for it.

"What the committee undertook to indicate was the chain of events that had been established by Reed organizing this group and then following it up and getting the young people into the Communist Party after going into industry was a very likely thing to happen.

"Now, I want to ask you whether or not Herbert Reed, after you left Antioch College, encouraged you in any manner to join the Communist Party when you saw him in the mid-forties. Whether you did or whether you didn't join at that time, did he encourage you to join?"

[fol. 179] Mr. Hitz: Excuse me. Let me interrupt.

That, your Honor, is Count 2, which is the first count that remains in the case.

The Court: That relates to Count 2?

Mr. Hitz: That is correct.

The Court: All right.

A. (Continuing.)

"Mr. Russell: I decline to answer that on the same grounds.

"Mr. Tavenner: Mr. John Ober testified—

"Mr. Scherer: I ask that you direct the witness to answer the question, Mr. Chairman.

"Mr. Clardy: I hate to do it, but I guess I must.

"You are directed to answer the question.

"Mr. Russell: I still respectfully decline.

"Mr. Tavenner: We have this picture, Mr. Russell: Here —

was this group of young students in Antioch College who were being organized by Herbert Reed.

"Herbert Reed attended every meeting. He lectured to them on Communism. He directed their every movement.

"Then we find when those young people went out into the world that Herbert Reed followed them. He got John Ober, a young lawyer, into the Communist Party, which is the thing he regretted more than anything that ever happened in his life.

[fol. 180] "Bebe Ober is another example.

"I want to know whether Herbert Reed had anything to do with your getting into the Communist Party."

Mr. Hitz: Your Honor, that relates to Count 3, which is the second count still in the case.

A. (Continuing.)

"Mr. Russell: Is that a question?

"Mr. Tavenner: Yes.

"Mr. Russell: I decline to answer.

"Mr. Tavenner: Well, did you to—

"Mr. Scherer: Just a minute, Mr. Counsel.

"Mr. Tavenner: Excuse me.

"Mr. Scherer: I ask that you direct the witness to answer the question.

"Mr. Clardy: Yes. I direct you to answer.

"Mr. Russell: The answer is the same.

"Mr. Clardy: Witness, can't you see you are putting your own personal feelings, your own personal likes and dislikes ahead of the welfare and the safety of your nation when you do that?

"Don't you see that?

"You have no right to arrogate to yourself the right to decide whether or not you will cooperate with your government—[fol. 181] and that is what we represent—in attempting to uncover the tentacles of this gigantic conspiracy that would entangle us.

"You can contribute a great deal if you would only help. If you have a mistaken belief that you have a right, as an individual to decide for yourself which of the laws you will obey, which you will not, which of the questions that Con-

gress propounds you will answer and which you will not, you are making of yourself an outlaw; you are putting yourself as a judge above the law; and you shouldn't do that.

"I am afraid you don't see that.

"I think aside from this you are probably a very good citizen; but you are certainly destroying your value to the community and to the country as a whole in taking that attitude, and I am amazed you don't see that, because you are obviously a man of superior intelligence.

"I wish you would reconsider and think about this and give Mr. Tavenner an opportunity to get from you the information that the committee seeks.

"Will you go on, Mr. Tavenner?

"Mr. Tavenner: Now, Mr. Russell, from all the committee could learn during the course of its investigation, those persons who admitted having been members of the Young Communist League Group in Antioch College in 1939, 1940, and 1941, did not know of any connection of any character by any professor at the college with the [fol. 182] Young Communist League Group, but in 1945 or 1946, which is in the mid-forties, as you described a moment ago, there was a group, an organized group of the Communist Party, in Yellow Springs, in which a number of the members of the faculty and student body were members, according to the testimony of Dr. Metcalfe.

"Did you have any knowledge of the existence of that group?

"Do you have any knowledge of the existence of that group in 1945 or 1946?"

Mr. Hitz: Your Honor, that relates to Count 4.

A. (Continuing.)

"Mr. Russell: I decline to answer that question.

"Mr. Tavenner: Well, Yellow Springs is just twenty or twenty-four miles from Dayton, is it not?

"Mr. Russell: That is correct.

"Mr. Tavenner: And you were employed during that period of time in Dayton?

"Mr. Russell: Yes.

"Mr. Tavenner: Did you have occasion to go backwards and forwards between Dayton and Yellow Springs so that you would have had an opportunity to have known of the existence of such a group had it existed?

"Mr. Russell: Is your question: Did I go back and forth?
[fol. 183] "Mr. Tavenner: Did you have an opportunity to know?

"Mr. Russell: Well, I did go back and forth. I had some friends in Yellow Springs, if that is your question.

"Mr. Tavenner: Yes.

"Then you were in a position where you could have had knowledge of the existence of such a group?

"Mr. Russell: Are you saying that anybody that visited Yellow Springs might have had such knowledge?

"Mr. Tavenner: No, but I say you could have. That is correct—

"Mr. Russell: I decline to answer that, if it is a question.

"Mr. Tavenner: Well, you refuse to answer whether or not you knew that there was such a group?

"Mr. Russell: Yes. I decline to answer that question.

"Mr. Scherer: I ask that you direct the witness to answer the question.

"Mr. Clardy: I so direct the witness.

"Mr. Tavenner: Professor Metcalfe testified there were about ten members in that group.

"Mr. Clardy: Did he answer, Mr. Tavenner?

"Mr. Tavenner: Oh, excuse me.

"Mr. Russell: The answer is the same.

[fol. 184] "Mr. Clardy: Proceed.

"Mr. Tavenner: We understand there were at least ten members in that group.

"Do you have any knowledge of your own of the extent of membership in the group?

"Mr. Russell: I decline to answer that.

"Mr. Tavenner: Did you ever attend any of the meetings of that group?

"Mr. Russell: I decline to answer.

"Mr. Tavenner: Now, I believe you came to Yellow Springs to work, didn't you, with the Vernay Laboratories in 1948?

"Mr. Russell: That's correct.

"Mr. Tavenner: Were you a member of the Communist Party at the time you went over there to work in Yellow Springs in 1948 at the Vernay Laboratories?

"Mr. Russell: I decline to answer that question.

"Mr. Tavenner: Were you acquainted with a person by the name of Arthur Strunk in 1948?

"Mr. Russell: I knew Mr. Strunk, but it was at a much earlier date than that.

"Mr. Tavenner: How early in date?

"Mr. Russell: I don't remember. Again, perhaps in the early 1940's, when I met him. I don't remember just when. [fol. 185] "Mr. Tavenner: What were the circumstances under which you met him?

"Mr. Russell: That question I decline to answer.

"Mr. Tavenner: How long did you know him?

"Mr. Russell: Oh, I'd know him if I saw him now.

"Mr. Tavenner: Yes. When was the last time you had a conversation with him?

"Mr. Russell: I again don't—

"Mr. Tavenner: You don't know?

"Mr. Russell: —have any firm recollection. Perhaps the mid-forties again."

Mr. Hitz: Excuse me. I'd like to interrupt you there.

Your Honor, as I announced at the commencement of the case, the government was dropping Counts, in the indictment, 5 through 13, for the reason that there did not appear sufficient demand to answer the question after the initial refusal.

Counsel has indicated to the Court, and to me, that it felt the next Count, which is 14, which is one that I did state we would like to have remain in the case, and would proceed with, was, in effect, answered at a later period of the questioning of the witness. I have carefully checked that, and I think that a fair interpretation of that portion of the testimony indicates that the witness subsequently, with [fol. 186] reference to other questions, did, in effect, answer Question No. 14, or Count No. 14.

That being so, we don't feel that we are justified in proceeding with Count No. 14.

Now, it so happens that Counts 15 and 16 were also dropped by the government at the commencement of the

case, for the same reason as we dropped the others, that the law now is that there has to be a more specific demand to answer than there was before. That being true, there are no more counts in the indictment from which we will get any testimony in the record.

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(Mr. Frank S. Tavenner resumed the stand and testified further on direct-examination as follows:)

• • • • •

(The following occurred outside of the jury's hearing at the bench:)

• • • • •

Mr. Freehill: Your Honor, may I raise another question while we are here?

The Court: Yes.

Mr. Freehill: I was not here, as you know, when this trial opened, and I was wondering whether the Court made any disposition with respect to the matter of pertinency. [fol. 187] The Court: I haven't been called upon expressly yet, except to give an indication.

I am convinced that the record requires me to find, as a matter of law, that the questions involved now were pertinent to the subject of the inquiry.

Mr. Hitz: That's all.

(The following proceedings were had in the presence of the jury:)

The Court: I take it that the matter that we have discussed is a matter going to a law point for the Court.

Mr. Hitz: That's right, your Honor.

The Court: Is that your view?

Mr. Freehill: Yes, your Honor.

The Court: All right, proceed.

By Mr. Hitz:

Q. Mr. Tavenner, from the record which you read, particularly the part of the afternoon proceedings that is noted to be at 2:19 p.m. on November 17, 1954, wherein it

appears that Congressmen Clardy, Scherer and Walter were the subcommittee to hear this testimony, with respect to that did those three Congressmen remain while Mr. Russell gave all of his testimony?

A. Yes, sir.

Q. Now, would you be good enough to tell us when and under what circumstances the members of the committee [fol. 188] to hear the Dayton testimony were originally appointed?

A. Yes, sir. On August 9th, at a meeting of the full committee, attended by six of the members of the nine members of the committee—

Q. Were you present?

A. Yes, sir. (Continuing) —at which I was present, the committee authorized the investigation at Dayton, and fixed the time of it for any time between that date and three weeks prior to the elections that were to be held that fall.

Q. I see. And who was named, if anyone, to conduct the hearings as a subcommittee?

A. After that action was taken by the committee, the chairman announced at that time who would constitute the subcommittee.

Q. The chairman was then Mr. Velde?

A. Yes.

Q. And whom did he announce would conduct the Dayton hearings?

A. Mr. Gordon H. Scherer, Mr. Kit Clardy, and Mr. Francis E. Walter.

— Q. I see.

Mr. Hitz: No further questions, your Honor.

Thank you.

Cross examination.

By Mr. Freehill:

Q. Mr. Tavenner, when the full committee determined—

Mr. Hitz: Now, Mr. Freehill, I wonder if I could interrupt. I did forget to ask one final question.

[fol. 189] By Mr. Hitz:

Q. Mr. Tavenner, did the committee have any rule with respect to the method in which the chairman should create subcommittees?

A. No, it did not.

Q. You have testified as to the practice. I have asked you about the rule. Did the House of Representatives have any rule on that subject?

A. No, sir, it did not.

Mr. Hitz: Thank you.

I'm sorry, Mr. Freehill.

By Mr. Freehill:

Q. Mr. Tavenner, I show you the Rules of Procedure.

A. Yes.

Q. Are these the Rules of Procedure of the Committee on Un-American Activities?

A. They are.

Q. Would you read this part appearing—

A. Would you mark it?

(Counsel indicates.)

A. Yes. (Reading.) "25(a). The Rules of the House are hereby made the Rules of its standing committees so far as applicable. (Rules and Manual, House of Representatives, Eighty-third Congress, Section 735.)

" 'A committee may adopt rules under which it will exercise its functions (I, 707; III, 1841, 1842; VIII, 2214) and may appoint subcommittees (VI, 532) which should include majority and minority representation (IV, 4551) and confer on them powers delegated to the committee itself (VI, 532).'"

[fol. 190] Q. Now, that is a rule of the House, isn't it?

A. Yes, sir.

Q. So the House does have rules governing—

A. Just a minute. (Examining document.)

Q. That's all, thank you, sir.

The House, then, does have rules governing committees, and the appointment of subcommittees.

A. That is a rule of the House.

Q. Yes, sir. Now, according to this rule that you have just read, of the House, the committee appoints the subcommittee. I want—

A. Yes.

Q. I want to ask you whether or not this committee ever took any action to appoint a subcommittee.

A. Yes, sir.

Q. When was that?

A. On the 22nd day of January, 1953, in conformity with the practice of the committee, at the beginning of every new Congress a resolution is adopted which authorizes, and in this case did authorize, the chairman of the committee to appoint, from time to time, subcommittees to perform any action that the committee itself was authorized to take.

Q. And did you bring along with you today a copy of that resolution?

A. No, sir.

Q. In testimony earlier today, did you say this meeting at which you now spoke as being in March of 1954?

A. This that I just referred to was January 22, 1953. Or maybe I misunderstood your question.

[fol. 191] Q. Didn't you, in testimony earlier today, or in answer to questions put by me on cross-examination, state that the committee took the action with respect to subcommittees in March of 1954, and not January of 1953?

A. No, sir. What you asked me was when this particular subcommittee was appointed. And my testimony was that the subcommittee was appointed at a meeting held on the 9th day of August, 1954.

Q. And now you say that you did not testify that the full committee took any action with respect to the subcommittee in March of 1954.

A. Not with respect to this specific subcommittee; no, I did not so testify.

Q. Mr. Tavenner, these are the Rules of Procedure of the committee. Would you just thumb through those and see whether or not there is a protection in those rules with respect to the appointment of subcommittees? (Handing to witness.)

A. No, sir, there is not. I know without looking.

Mr. Freehill: Your Honor, I would like to introduce these rules into evidence as Defendant's—

The Court: They may be marked for identification.

The Clerk: Defendant's Exhibit "C" for identification.

(Defendant's Exhibit No. "C", Witness Tavenner, was thereupon marked for identification.)

The Court: Counsel should speak louder, since the jury is having difficulty of clearly hearing.

[fol. 192] Mr. Freehill: I'm sorry. I'm terribly sorry.

Your Honor, there has been also marked Defendant's Exhibit "A" and Defendant's Exhibit "B".

By Mr. Freehill:

Q. Mr. Tavenner, do you have Part 4—

A. Yes, sir.

Q. (Continuing) —of those hearings? Could we spare this as an exhibit, sir?

A. Yes, sir, you may have it.

Mr. Freehill: Your Honor, I'd like—I notice there are just some markings in the margin. A clean copy of Part 4 of the Dayton hearings was presented here earlier, and we do not have a clean copy.

The Court: Here's Part 4, but—

(Counsel examines exhibit.)

The Court: Take it up with counsel to see if they have any objection to using it and erasing the margin notes.

Mr. Clerk, what was the last exhibit number identified?

The Clerk: "C".

The Court: Thank you.

Mr. Freehill: I'd like to have this marked for identification.

The Court: Now, has a similar copy already been identified as Exhibit "A" or "B"?

Mr. Freehill: Yes, your Honor. An identical copy was used by Mr. Fanelli in the cross-examination of Mr. Scherer.

[fol. 193] The Court: Now, you are offering Part 4, and you are asking it be marked for identification. If a similar copy has already been identified—

Mr. Freehill: No, it has not. I'm sorry, your Honor.

The Court: Very well. Then that may be the identification "D".

The Clerk: Yes, your Honor.

The Court: All right.

(Defendant's Exhibit No. "D", Witness Tavenner, was thereupon marked for identification.)

By Mr. Freehill:

Q. Mr. Tavenner, could you tell us how many series of hearings in 1954 your committee and/or subcommittees had?

A. The major hearings consisted of a hearing in San Diego, Los Angeles, Seattle, Portland, in Michigan, at Detroit, Lansing, Flint; Albany, New York; Chicago, Milwaukee, and in Washington, a matter relating to the area of Baltimore; hearings in New York City. And that comprised all of the major hearings. There were individuals brought in from time to time, and hearings conducted, but that related only to segments of the larger hearings. Those I do not recall without—I would not recall them.

Q. Mr. Tavenner, I show you a copy of the annual report for the year 1954, of the Committee on Un-American Activities, and I direct your attention to Page 1, and I ask you to [fol. 194] read the first sentence of the fourth paragraph.

A. Yes, sir. (Reading.) "The House Committee on Un-American Activities, in its official function during the 83rd Congress, called before it in either public or executive session nearly 600 witnesses."

Q. Now, Mr. Tavenner, you don't have any independent recollection of this proceeding that you were reading from other than what you read?

A. Oh, yes, sir. Yes, sir.

Q. You mean out of all the 600 witnesses heard that year, this witness stands out?

A. No, I wouldn't say stands out, but I recall very definitely the testimony of quite a few of the witnesses at the

Dayton hearings. I did a great deal of work in the preparation of that hearing. I sat down and prepared this report after the hearings, setting forth all of this testimony; compared it with the original document. And I remember it pretty well.

Q. Now, Mr. Tavenner, isn't it true that when you testified out of the hearing of the jury earlier this morning, that you said that you refreshed your recollection with respect to this proceeding before you came here today?

A. I refreshed my recollection with regard to the names of the persons who were present at the executive session which authorized the hearings to be held. That was what I was referring to, as well as the date of it. But other than that, I recall it perfectly.

[fol. 195] Q. Were you present at any telephone conversation that the chairman of the committee had with Mr. Scherer?

A. No, sir, I was not.

.

The Court: The record may show that the jury has retired from the courtroom.

You may proceed.

Mr. Freehill: Your Honor, first, we would like to preserve our position that the question of pertinency and purpose to punish on the part of the committee should go to the jury, as well as whether or not the committee was properly constituted; whether there was a rule authorizing a subcommittee and by whom such subcommittee be appointed, and whether appointment by telephone was appropriate; and whether appointment of the subcommittee was actually made in this case.

The Court: On the first matter, I have determined that the question of pertinency is one for the Court to determine. And with respect to the questions asked in the respective counts before us, I am of the opinion, as a matter of law, that the inquiries were pertinent, and so rule, on the present record.

Mr. Freehill: Your Honor, I would like to pass up our motion. (Handing document to the Court.)

[fol. 196] The Court: Perhaps I should note that on the other questions to which reference has been made, I will

give those matters further consideration, and will come to a decision at the time the instructions are settled.

Mr. Freehill: I passed up to your Honor a Motion for a Directed Verdict, or in the Alternative for a Judgment of Dismissal, and, if your Honor please, I would like to argue the motion.

The Court: Very well. You may proceed.

The Court: Well, if there's nothing further, I might indicate—

Mr. Freehill: Your Honor, I am not quite clear as to what your Honor, the scope of your ruling when we were at the bench on the question of pertinency, which came up before I entered the case. I understood you to say that it was pertinent to proper inquiry. I wasn't sure whether or not you included in that the punishment aspect; that they brought him merely to punish him for contempt.

The Court: Yes, I believe I would have to include that.

Mr. Freehill: Well, we feel very strongly, your Honor, that that is something that should go to the jury.

The Court: You think that is a matter that should go to the jury?

[fol. 197] Mr. Freehill: Yes, your Honor.

The Court: Well, I will consider that. I felt that that issue was pretty well precluded by some of the decisions where it was indicated that if there were a pertinent inquiry within the legislative, or within the scope of the legislative power, the declarations of individual members weren't even admissible. Now, that was the theory that I proceed on.

What is your view on that, Mr. Hitz?

(General discussion followed.)

DENIAL OF MOTION FOR ACQUITTAL

The Court: On the motions, or the Motion for Acquittal, as to each count, I believe I must deny the motion. I will make a record of it when we get back in the courtroom, at the bench, but it may be that the question of the sufficiency of the indictment isn't free from doubt, and I have a good

deal of respect for the judges who have taken that view. I have a feeling, however, that on the question of alleging the legislative purpose, and alleging a willfulness, that since the statute itself doesn't, in terms, make those elements, that the indictment need not do so, and I am conscious that there's a very substantial division of authority on that analogy in cases.

(Further general discussion.)

The Court: Now, on requests, I have reference now to the latter group of requests submitted by counsel, and I [fol. 198] have assumed that the first group of requests has been merged into the second group. And I have just noted the word "withdrawn" on your first group, and I don't think I will put those in the file. They seem to be fully covered in the second group.

I will give defendant's Request No. 1, in the usual form. I will not single out and use the expression in form here, by way of repetition, that he is presumed not to have been in contempt when he testified before the House Un-American Activities Committee.

Mr. Hitz: Could we note that was granted as to substance? We do that sometimes here, and it has a certain meaning that—

The Court: Well, you can do it as you choose. I have stated what I am going to do in the record.

Mr. Hitz: All right.

The Court: I will give Request No. 2 in substance.

I will give No. 3 in substance.

I will give No. 4 in substance.

I will give No. 5 in substance.

I will give No. 6 in substance.

Mr. Krug: Your Honor, it's perhaps obvious to you, really.

The Court: With the modification.

Mr. Krug: We did not know precisely what count you would knock out, and we put this on the basis that you would knock out all except 2—

[fol. 199] The Court: Right.

Mr. Freehill: —Your Honor, and I understand you are not knocking out 4.

The Court: Yes. Well, no, not No. 4, but No. 14.

Mr. Freehill: Yes.

The Court: That's right. I am submitting No. 4 to the jury.

Mr. Krug: No. 4, your Honor, is the question—

The Court: 2, 3 and 4.

Mr. Krug: (Continuing) —the question which we claim is—

The Court: The same question.

Mr. Krug: Not precisely, your Honor. That the question on one page specified in the count, there's no direction to answer. That there was another question on the next page with a direction to answer, but the indictment doesn't specify the second one. It only specifies the first one. So we say that the question specified on the first page, the question specified in the indictment is not contempt, because there's no direction to answer.

If you will look at our memorandum, your Honor, I think you will find that set forth.

The Court: Let's see here.

Mr. Hitz: Now, you set out Request No. 6 as if 4 had been abandoned. Am I correct in that, Mr. Krug?

[fol. 200] Mr. Krug: This is on Page 4 of our memorandum, your Honor. May I show you my carbon copy of the memorandum?

The Court: Yes.

(Court examines memorandum.)

The Court: Now, on that particular ground, you have no question as to Count 2, is that right?

Mr. Krug: On this ground that—

The Court: The one we have last mentioned.

Mr. Krug: (Continuing) —there was a direction on Count 2 and there was a direction on Count 3. We are not contesting that, your Honor.

The Court: All right. How about this further ground here: "Well, you refuse to answer whether or not you knew that there was such a group?" That's on Page 7083.

Mr. Freehill: That's right.

The Court: And, "Yes. I decline to answer that question. "I ask you to direct the witness to answer the question."

Mr. Clardy says: "I so direct the witness.

"Mr. Russell: The answer is the same."

I must deny your objection on that.

Mr. Freehill: Your Honor, even though the question that's in the indictment is tied to a period '45 and '46, but [fol. 201] the question that he was directed to answer on 7083 is not directed to any period. Entirely different questions, calling for a different answer.

The Court: To be consistent with some of these others, maybe there's force in the government's abandoning that. My view of the basis of that principle is that it isn't that a direction to answer after refusal is a sacrosanct formula that must be gone through as an essential to a prosecution. It's simply one of the means to negative the idea that after there was a refusal, and upon some particular point, and a ruling on the refusal, the witness assumed that there wasn't any further reason to answer. Now, the question couldn't arise in this case, in my view. You can have, of course, your record on the thing. But it was again calling the matter to his attention, and directing him to answer, and it was substantially the question he had refused to answer, the question with regard to 1945. And this further discussion negated, in my view, any legal point that he would understand that his refusal had been sustained, because it was the same question and expressly covered the years mentioned.

Mr. Krug: Even though, your Honor, the first question had to do with present knowledge and the second question had to do with passage? They're different questions, really.

The Court: Well, I'm going to submit that to the jury. I deny your objection. I don't think that within the rule on [fol. 202] which you rely there's any showing at all which would negative as a matter of law the willfulness of the refusal.

You can argue the question of willfulness to the jury on this record.

I will give No. 7 in substance.

I'm inclined to give the first two paragraphs of No. 8 in substance.

(Discussion.)

Mr. Hitz: Your Honor, of course, realizing you are going to give the first two paragraphs, if they are given in the exact language—

The Court: I am not going to give them in the exact language.

Mr. Hitz: And if they are given in different language, but the language of this particular phrase is adopted, I wonder if I could be heard on that, and that phrase is, in the second sentence of the first paragraph "There is a conflict in the evidence . . ." If the Court should nevertheless adopt that particular phraseology, I think it's a little bit too strong a statement.

The Court: I doubt very much, gentlemen, that there's a conflict in the evidence.

Mr. Hitz: That's right.

The Court: But—

Mr. Hitz: They contend it.

[fol. 203] The Court: That's true. And I'm not going to instruct the jury that there's a conflict. Maybe I should be forthright about it, and exercise my own judgment, and say that the evidence is clear, and without substantial dispute. But we do have that printed record, and I'm going to leave that fact open for your argument.

I will give, suggest the idea in your paragraph 3 of Request No. 8, that I am not going to leave it loosely about a supposition, because it doesn't define who supposed it, and—

Mr. Krug: We use that word, your Honor, if I may interrupt, simply because we wanted to use a word, get away from the word "purported." Purported struck us as sort of a legal word.

The Court: Yes. I may use that language, but I will tie it in to suppositions of whom, in my view, if any supposition is material. It's the supposition of the committee members acting themselves, and as announced in an open hearing. It wouldn't be the supposition of a spectator, for instance.

Now, on the following paragraph, as to the elements, I will involve the first element, with some qualifications as I have suggested. Element 2, I have grave doubts that I could leave that question to the jury.

Mr. Hitz: That certainly is an interpretation of practice, as would be interpretation of a statute, if it were done by a statute, which is a question of law.

[fol. 204] The Court: Could I invite the jury to say that there was some other rule than the evidence shows?

Mr. Freehill: Well, your Honor, if I may point to the Rules of the Committee, which I think you have before you there, this is the Rules of the Committee.

The Court: Yes.

(Further general discussion.)

The Court: * * * It does seem to me, however, that as a matter of law, I must instruct the jury that the chairman had the right to designate the members of the subcommittee, and that the subcommittee, through a quorum, had the authority to act.

Now, whether that's true as an absolute matter of law, apart from the doctrine of the Emspak case, or whether no question having been raised before, we reached the same result, leaving out this one factual question, is really immaterial, in sum total. You have your record.

Mr. Hitz: Then as to 3rd, or the 3rd element here, that will be denied?

The Court: That will be denied. I am going to leave the question of whether they were actually appointed, though, and whether they were acting as a subcommittee, to the jury.

Mr. Hitz: All right.

[fol. 205] The Court: 4th, I'm going to submit.

Mr. Hitz: As written, or in substance, your Honor?

The Court: In substance.

And 5th, I'm going to submit.

Mr. Hitz: Your Honor, now I wonder if I could be heard with respect to Part 1?

The Court: Yes.

Mr. Hitz: Which, if given in substance, would seem to, in its general coverage, leave up to the jury the very things which we have piecemeal ruled out. "That the body before which defendant appeared was supposed to be a subcommittee." That would enable them to determine that it was or was not.

The Court: Well, I am going to qualify that language to convey the thought that it was understood by the members acting and present at the time of this designated group that they were at the time acting as a subcommittee.

Mr. Hitz: Oh.

The Court: And that issue is raised by the printed record, from which a clear inference might be drawn. That's what I have in mind.

Mr. Hitz: But then the way you will express what is the apparent meaning of Part 1st, is not to let them conjecture as to whether there was authority to create the subcommittee.

[fol. 206] The Court: No.

Mr. Hitz: All right.

The Court: I think I will give Request No. 9, by way of comment.

I had proposed, in my own mind, to instruct them on the question of willfulness, and I think this relates to that matter. If the refusal to testify was either inadvertent or by reason of mistake or misunderstanding, or by accident, it wouldn't be willful. And if he weren't fairly apprised that his answer was demanded, notwithstanding any objection, then it wouldn't be willful. I don't think I will give this as a separate instruction on a principle of law, apart from the question of willfulness, but I believe I will comment, using this particular approach.

Mr. Krug: It applies particularly, your Honor, to Count 4, I think.

The Court: I understand that. But you can argue its application to Count 4.

Given, No. 10.

Mr. Hitz: As written, your Honor?

The Court: Yes, substantially.

Do you want an issue raised as to whether they were refused on the other two counts? Do you think there's an issue there?

Mr. Krug: Counts 2 and 3?

[fol. 207] The Court: Yes.

Mr. Krug: I don't think there's any issue as to refusal of Counts 2 and 3.

The Court: I hate to be telling the jury they have to decide whether refused or not when you will almost have to concede the argument that they didn't.

Mr. Krug: Yes.

The Court: I will see what you say in argument.

Mr. Hitz: Well, since they don't press it as to more than the one count, may we not be understood that Request No. 3 could be amended to read "As to Count 4?"

Mr. Krug: Request No. 11, you mean.

Mr. Hitz: I meant that, yes.

The Court: Well, I'm going to let you argue that, I believe. And I am going to submit the issue in about this form: Whether he willfully refused. And then by way of comment I may refer to the distinction and the contentions as between the 3 counts.

Mr. Hitz: And I am sure that the charge, as a whole, will be such that the jury, from the use of the word "willfully," there or anywhere else, won't assume that it might be such an intent that it would impute bad faith.

The Court: No, I will try to make that clear.
[fol. 208] I will refuse 12.

I will refuse 13.

I will refuse 14.

Mr. Krug: Your Honor, may I comment here?

The Court: Certainly.

Mr. Krug: If I'm not mistaken, that Request No. 14 sets forth our contention on the Costello case, as to which, as to where the contempt really was.

The Court: Yes.

I will give Request No. 15, in substance, but I will let you argue its application along the line suggested in the 3rd paragraph. I think that's—

Mr. Hitz: Your Honor, with respect to paragraph 1—

The Court: Permitted.

Mr. Hitz: (Continuing) —the use of the word "scrutiny" here would seem to me to be uncalled for, and I hope your Honor doesn't plan to use that as part of his, in substance, giving of the instruction. It approaches the accomplice charge.

The Court: I hadn't in mind giving it in form as requested.

Mr. Hitz: Yes.

The Court: I am going to give the general instruction upon reasonable, or upon burden of proof and reasonable doubt, that I usually give, but it comprehends your basic ideas.

[fol. 209] It doesn't seem to me that Number 16 is appropriate, at least at this point. If there are any substantial conflicts in the testimony, then I think it would be, and I will withhold a ruling on that.

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The Court: I will give 17 in substance.

Mr. Hitz: As to 18, I think that's usually given only where the evidence is wholly circumstantial, and from which you are drawing inferences.

The Court: I don't ordinarily give instructions on two hypotheses anyway. That has been pretty severely criticized in our circuit, in any event. And where the proof doesn't involve circumstance, I am inclined to agree.

Mr. Hitz: And formally the ruling on 18 will be denied?

The Court: I am not going to give that instruction at this time.

Mr. Krug: That is which one, your Honor?

The Court: 19.

Mr. Krug: 19. With regard to 18, your Honor—

The Court: Yes.

Mr. Krug: May I recall that in the argument of the motion yesterday, that it became quite evident that part of this case does depend on inference and on circumstance.

[fol. 210] The Court: What part?

Mr. Krug: Representative Scherer's testimony that he was appointed on the committee by telephone call from Mr. Velde, and then there was, the government wishes to draw an inference from that that the other two were appointed by a telephone call from Mr. Velde. But there's no direct evidence of that.

The Court: I will let you argue that. And if there is a reasonable doubt, I am going to tell them they can draw reasonable inferences, if they have a reasonable doubt. I think it's a matter of argument, under the circumstances.

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Mr. Freehill: Your Honor, there were four defendant's exhibits marked for identification as Exhibits "A", "B", "C", and "D". I'd like to offer those in evidence at this time.

The Court: Any objection?

Mr. Hitz: No objection, your Honor.

The Court: Received.

(Defendant's Exhibits "A", "B", "C", and "D", were thereupon received in evidence.)

The Court: On the motion heretofore interposed on behalf of the defendant for judgment of acquittal on Counts 2, 3 and 4 of the indictment, the motion as to each and all of the counts is hereby denied.

You may proceed.

[fol. 211] Mr. Freehill: Your Honor, the defendant would wish at this time to make an offer of proof of material appearing in the appendix of the John T. Watkins versus United States of America case, in the Court of Appeals for the District of Columbia Circuit.

We recognize that, on the present state of the law in this circuit, you would not be able to accept this as evidence, but we do want to reserve, in view of the fact that the law may change in this circuit, or that it may be reversed, changed in the Supreme Court, we would like to offer from the appendix, beginning at Page 110, et seq., material that was stipulated in the Watkins case, to show the purpose of the Un-American Activities Committee of the House was to expose individuals, and their former Communist connections, and was not solely operating for a valid legislative purpose.

Mr. Hitz: That's 110 through the end, through Page, through Page 174?

Mr. Freehill: Yes.

Mr. Hitz: Your Honor, we object to all of that material as not being material, and not being relevant. I'm sure that the Court understands the reason for that, and evidently Mr. Freehill does, too, and the ruling of the Court that's been made on similar offers of proof in the case. We continue to object to this material for that reason. We had contemplated, however, making an additional objection on

[fol. 212] the grounds of competency of the material offered, to prove what they seek to prove, which would be, in part, that the material is hearsay as coming from the Watkins record, and second, that it had not been sufficiently verified and proved with respect to its authenticity.

We do not mean to make reference to the truth of what was stated in newspaper articles. By authenticity we have reference to whether or not the Watkins record accurately portrays the newspaper printed. We will not make those formal objections with respect to competency of this material, and with respect to the authenticity of what it purports to be. I do not state, for example, that we concede that a remark attributed to any particular individual was correctly quoted. We merely agree that the Watkins record correctly quotes the newspaper in which it appeared.

With that understanding, we do not object to any grounds except relevancy and materiality.

The Court: The offer is denied.

Mr. Freehill: Your Honor, the defense rests. And we'd like to renew our, make a motion for a judgment of acquittal, for the same reasons as stated in our motion for a directed verdict.

The Court: Denied.

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[fol. 213] INSTRUCTIONS OF THE COURT

The Court: Now, members of the jury, the trial is about over, as you know. You have heard the evidence, and you have heard readings from the exhibits which have been received in evidence. All of the evidence which the Court has considered proper, and which might be helpful to you, has been received, and you are not to consider any evidence which has not been received by the Court, nor or (sic) you to consider evidence which, having been received by the Court in the first instance, was later stricken. You are not to decide this case on any basis other than the evidence received in open court, and the inferences that reasonably can be drawn therefrom in the exercise of reasonable and common sense. You are not to consider the objections made by counsel to the admissibility of evidence, or to suppose

reasons or lack of reasons for the objections, because you can see at once that those form no part of the evidence. Counsel have the right, and indeed the duty, to make objections, and thus to raise legal points, if they believe those legal points well taken; and those which present, and they do present, by way of objection, purely legal points for the Court to decide, don't, as I have indicated, constitute evidence, and no inferences should be drawn from them or from the ruling, except for you to know that when evidence is excluded it is not before you and when it is received it is deemed before you for such weight, within the issues submitted to you, as you may properly attach to it in the light of the law as I give it to you.

[fol. 214] You have heard the arguments of counsel. What counsel have said, except when there has been an agreed fact stipulated to, or agreed facts stipulated to, to which I called your attention at the time, is not evidence. You may take as established the facts agreed upon between counsel, but their arguments aren't evidence. Their arguments, however, are entitled to be considered, deserve to be considered by you, not because they are evidence, but because they call to your mind the various contentions of the parties on either side so that you can examine the evidence in the light of such contending positions to determine in your own mind which of them are justified, and to what extent, and which of them are not, and to what extent.

Now, I have said that the trial was about over, but perhaps the most important part of the trial remains—for you to return into court, after fair, considered deliberation, a fair, impartial and considered verdict.

You are the sole judges of the fact, as you know, and the Court is the sole judge of the law. The law of the case can't be given to you in one paragraph. It's going to take a little time. And since that is necessary, I think that it's necessary for me to call your attention that the order in which I give you these rules of law doesn't necessarily determine their relative importance. You shouldn't single out any particular instruction, or part of these instructions, [fol. 215] and give that part undue weight, but you should interpret and understand the instructions as a whole, and

give weight to each part of the instruction in the light of the whole instructions.

While this case involves somewhat narrow fact issues, and doesn't seem too complicated, I think that I will, at this point, just sketch for you, by way of summary, what I am going to tell you about the law. Sometimes I find that when we start right off in detail the jurors have questions occurring to them in their minds, and think, "Well, now, what about that?" If I give you the whole scope of the instructions right now, maybe you will see, as we go along, the questions which you might otherwise have bothering you in your mind will probably be answered later on in the instructions.

So I am going to tell you this: I have already referred to the present status of the case, to what matters are before you by way of evidence, and to the respective functions of attorneys, Court and jurors. Now, next, I will discuss more particularly the rules on weighing and interpreting evidence, and the matters to bear in mind in determining the credibility of witnesses, then the particular charges before you will be turned to specifically, and you will be given the law which they directly involve. I will then instruct you on certain issues which I have determined as matters of law, and I will also then specifically submit to you the fact issues which remain after those legal issues have [fol. 216] been disposed of. Then you will be instructed as to the presumptions in favor of the defendant and the burden of proof with respect to the issues of fact, and reasonable doubt will be defined to you. It will be explained how your respective verdicts will depend upon whether you find for the government beyond all reasonable doubt on these fact issues, and the rules of law governing this determination will be given you. And finally I will tell you how the verdict will be received so that you will know how to report the particular verdicts which your findings on the facts will require, so that the verdicts as reported will truly reflect the true verdicts that you have arrived at.

I may have some comments as we go along to make concerning the evidence, how it lines up on one issue or another, not with any idea of controlling your decision with

regard to the evidence, because I have told you that you are the fact-finders on the issues which are submitted to you, and that is your sole and ultimate responsibility. But when I comment on the evidence, it will be to assist you in calling to mind some of the possible conflicts or lack of substantial conflicts on particular issues, so that you can more readily see what is involved.

Now, being the sole and exclusive judge of the facts, the jury is, of necessity, the sole and exclusive judge of the credibility, that is, of the believability of witnesses, or as to the amount of credit or credence which you will give to the various witnesses.

[fol. 217] In determining the credibility of witnesses, or the weight to be given to their testimony—and you can apply these rules no matter who the witnesses are, or no matter what position or station they occupy—you may take into consideration their means of knowledge, strength of memory and opportunities for observation to the extent shown by the evidence in the case; the reasonableness or unreasonableness of their statements, and their consistency or inconsistency, if any has been shown; the motives actuating them, so far as such motives appear from the evidence in the case; the fact, if it be a fact, that they have been contradicted by other evidence in the case; the bias, prejudice or interest of the witness, if any has been shown; their manner or demeanor upon the witness stand, and all other factors which intelligent people, such as yourselves, take into consideration in determining what a given fact is in the more serious and weighty affairs of life, and reasonable doubt exists.

If, after considering all of the evidence, you find that any witness has wilfully testified falsely as to any material fact, or has made a wilful misstatement with the intention of misleading you as to any material fact, you have the right to disregard the whole or any part of his testimony, except as it may have been corroborated by other credible testimony in the case. But in the absence of some indication of the contrary, and subject to these rules that I have given [fol. 218] you, of course, you may assume, if that be your belief, that a witness is telling the truth.

The law requires the prosecution in a criminal case to prove its charge against a defendant beyond a reasonable doubt, and does not require the defendant to disprove the charge against him, and it is the defendant's privilege to testify or not to testify as he chooses. The fact that the defendant did not testify at the trial does not create any prejudice against him, and you must not permit that fact to weigh in the slightest degree against him or to enter into the discussion or deliberations in the jury room. Since you are to base your decision on the evidence, and the reasonable inferences to be drawn therefrom, in the light of the instructions of the Court, you are not to allow speculation or conjecture to enter into your deliberations or your verdict. You will weigh the evidence, evaluate and sift the testimony with care. You may draw reasonable inferences, as I have mentioned, from the evidence received, and consistent with these instructions, and consistent with the rule that reasonable doubts are to be resolved in favor of the [fol. 219] defendant, and you may determine the meaning and significance of the evidence in the light of common sense and reason. You will not let bias, prejudice, anger or sympathy affect you or enter into your verdict, but you will act fairly and impartially in all respects.

In this case the defendant, Norton Anthony Russell, has been charged in an indictment in 16 counts with violation of an act of Congress of the United States, which provides in substance that every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully refuses to answer any question pertinent to the questions under inquiry, shall be deemed guilty of a misdemeanor, punishable as provided by statute. [fol. 220] While I have indicated that the indictment contained 16 counts, the government has abandoned all but three of the counts in the indictment. And by agreement of both sides, you are hereby instructed, in view of such abandonment, to return a verdict of not guilty on Count 1, and on Counts 5 through 16. And you will be asked to return such a verdict on those abandoned counts when you come back into the courtroom.

Now, this leaves, then, as you see, three counts for your determination. Those are Counts 2 and 3 and 4 of the indictment. And as you heard my instructions to the clerk, with the consent of counsel the clerk has stricken out, in red-pencil, those counts on which you are to return a verdict, a directed verdict, and left the introductory allegations which relate to each of the three remaining counts, and also the numbered Counts 2, 3 and 4 without being stricken out, so you can follow through in the indictment those particular counts which remain, and see those which have been abandoned.

Now, I am letting you take this indictment into the jury room so that you can keep in mind what the three counts relate to, and relate the substance and their identity to your verdicts on the corresponding numbers.

I have already told you that the indictment isn't evidence. You will not consider in any way against the defendant the [fol. 221] counts or the evidence received as to the counts on which you will be directed to return, and you are directed to return, a verdict of not guilty. And I repeat, that the fact that an indictment has been returned on any count, or signed by the United States Attorney, or the foreman of the Grand Jury, or that it is referred to in this proceeding, or that you are permitted to take it into the jury room, or the fact that charges were made against the defendant in the indictment, or the particulars of them, are in no sense, in and of themselves, evidence, or to be taken as evidence against the defendant in any way. Because an indictment performs merely the function of bringing the defendant to trial, and acquainting him, the Court and the jury with the nature of the charges against him for determination in the manner provided by law.

Now, Count 2, which is the first count for your consideration, of the indictment, in substance charges that on or about November 17, 1954, in the District of Columbia, a legally constituted subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings pursuant to law and a resolution of Congress; that the defendant, Norton Anthony Russell, appeared as a witness before that subcommittee at the place and on the date above stated and was asked a ques-

tion which was pertinent to the question then under in-[fol. 222] quiry: That then and there the defendant unlawfully refused to answer that pertinent question.

Now, with these introductory allegations, Count 2 further alleges that under the circumstances stated, the question the defendant so unlawfully refused to answer was this: "Whether you did or didn't join (the Communist Party) at that time, did he (Herbert Reed) encourage you to join?"

Count 3, another count which, as you will recall, is now before you, charges that under the circumstances above mentioned, a question which the defendant unlawfully refused to answer was: "I want to know whether Herbert Reed had anything to do with your getting into the Communist Party."

Count 4 is identical by way of introductory allegations, but the question there which it is alleged was put to the witness was: "Did you have any knowledge of the assistance of that group, the existence of that group (an organized group of the Communist Party in Yellow Springs) in 1945 or 1946?"

Now, those are the three charges, and the only charges which are open for your decision.

Several things should at once be noted about these charges. They do not involve whether the defendant was himself a Communist, or what his answer may have been to the particular questions asked. Although the charges are frequently referred to as charges of contempt, there [fol. 223] is not any question of personal animosity, or dislike, or spite or malice toward the committee in issue. And that's beside the point whether there was or not, because that's not an essential element of the charge. The reason assigned for any refusal to answer would be immaterial if, in fact, there was a wilful refusal to answer. And the defendant is not on trial on any charges here other than those made in the three counts. You must determine the guilt or innocence of the defendant separately as to each count, and your verdict will be taken separately as to each count.

The allegations of each of these three counts, as contained in the indictment, involve certain questions of fact,

and they involve certain questions which I have determined to be questions of law.

On the questions of law, that I have determined within my responsibility, you, of course, must take the law as I give it to you, and that is no concern of yours.

Now, these are the things that I have determined as questions of law, and these are my decisions on them, and you will see readily, after I have stated them, what issues of fact remain for your determination:

I have determined that the Committee on Un-American Activities of the House of Representatives, during all times material herein, had the authority to conduct hearings [fol. 224] through a subcommittee. I have determined that such subcommittee could legally consist of at least three members of the full committee, and that such subcommittee could legally be appointed by the chairman of the full committee; that such appointments did not have to be in writing, and could legally have been made by the chairman of the full committee in a committee session, over the telephone, or personally, or through a combination of these means, provided that he specifically designated the members to act as such subcommittee, and at such time understood, and the members so designated understood, that they were appointed as such subcommittee, and that pursuant to such appointment they were to act as a subcommittee, and were so acting at the time in question with the approval of the chairman of the full committee.

I have further determined as a matter of law that a duly-appointed subcommittee is authorized to act in making such inquiry as is here involved, provided that at least a quorum of such subcommittee be present at the time or times in question, and that a quorum in the case of a subcommittee of three members is at least a majority thereof, or two members.

I have further determined as a matter of law that as to each count of the three counts before you the question alleged to have been asked the witness was a question pertinent to the subject of the inquiry then being conducted, and that such inquiry was for a legislative purpose and was within the power of inquiry of a legally-constituted subcommittee of the House Un-American Activities Committee.

I have also determined as a matter of law, based upon the record and the stipulation of the parties, that the procedural requirements for bringing the charges here involved were complied with by the government in accordance with the law and the House resolution.

Now, with these questions of law out of the way, so far as you ladies and gentlemen are concerned, the first question for you to decide is whether on or about November the 17th, 1954, in the District of Columbia, at the time when the defendant appeared before it, and was asked the question involved in the particular count, there was a meeting of a subcommittee. Now, there is no question, if there were a hearing at all, that it was on or about the date indicated, and there doesn't seem to be any question but that if there were refusal to answer any inquiry as charged it was in Washington, D. C. So you won't be troubled about that phase of the question, I suppose. And you won't be questioned about the fact of whether the defendant appeared before some committee, or purported committee, or some part of it. But that's the first issue, was, whatever happened, did it, in the counts and each of them, happen in [fol. 226] the District of Columbia, and was there an appearance before some body?

Now, the next question is, was that body before which there was an appearance a legally-constituted subcommittee of the Un-American Activities Committee of the House? Now, I have defined to you the law with regard to the appointment of subcommittees, and what constitutes a quorum, and how members may be appointed. And the fact as to whether the subcommittee was so appointed, and was so acting at the time of Russell's appearance, is left for your determination under these instructions.

If you find in this connection, beyond a reasonable doubt, that the body before which the defendant appeared actually was intended and supposed to be a subcommittee by its members; that the chairman of the full committee had theretofore designated and appointed Representatives Clardy, Scherer and Walter as such subcommittee for the purpose of conducting such hearings, on that particular occasion conducting the hearing that was on when Russell appeared, and that such appointment had been communi-

cated to them by or under the direction of the chairman of the full committee, and that pursuant to such designation at least a majority of such subcommittee was actually present when the questions involved in these charges were asked, and that they understood and it had been announced that they were then acting as a subcommittee, then you will [fol. 227] find that the defendant appeared at such time before a legally-appointed and constituted subcommittee of the Un-American Activities Committee of the House of Representatives.

Now, I may add by way of comment that the evidence indicates without dispute that the defendant was, in fact, present at the hearing room when the questions were alleged to have been put. You will recall Mr. Scherer's testimony that the chairman of the full committee called him during the noon recess of that day and told him, in effect, that the designated subcommittee was to act that afternoon, and that pursuant to such direction they did act, and that at all times the defendant was on the stand at least two out of three members of the subcommittee were present. And I believe the evidence, as I recall it, indicates that, as a matter of fact, most of the time at least three members were present.

You will also recall Mr. Tavenner's testimony concerning the designation of the same three members as the subcommittee on August the 9th, 1954, and that it was contemplated the hearings would be completed prior to the fall election. Now, you are instructed that that fact, in and of itself, wouldn't prevent a legal subcommittee from acting after the fall election, or prevent their appointment to act afterward; but that part of the evidence, together with all other evidence in the case, can be considered on the point [fol. 228] of whether there actually was an appointment of the subcommittee, and the hearing conducted by a subcommittee as of November 17th. If there was such an appointment, either at the time of the August committee meeting or later on on the 17th over the telephone, together with acceptance and action, I have indicated could amount to an appointment. It wouldn't matter whether originally it was contemplated that the subcommittee would complete its work before the fall election or not. If there weren't

such an appointment, why, that wouldn't be determinative one way or another either, but it may be considered, together with all of the other facts and circumstances in the case, to determine within the rules I have given you whether there was actually an appointment of a subcommittee, and action of the subcommittee or hearing conducted by the subcommittee pursuant to such appointment at the time involved.

Now, you have heard referred to the typewritten transcript of the proceedings of the November hearings, purporting to show that the subcommittee was meeting at the time Russell appeared, and purporting to show that that appearance was in the afternoon rather than in the morning, and you have heard referred to Part 4 of the printed hearing reports purporting to show that immediately prior to Russell's testimony the full committee was acting, and Russell's testimony was in the morning. Now, that's a fact question for you to decide. Do you think that Russell actually testified in the morning, as the printed form purports [fol. 229] to show, or do you believe beyond a reasonable doubt that he actually testified in the afternoon? And do you believe beyond reasonable doubt, within the rules of law I have given you, that the subcommittee was appointed prior to that afternoon, and during Russell's testimony that afternoon was the subcommittee acting as such?

You have heard the explanation as to this apparent discrepancy between the printed record and the testimony of Mr. Scherer and Mr. Tavenner, and the stenographer, and the transcript of the testimony. You have also heard that a Mr. Moulder was in attendance when the defendant testified. Now, if you believe that the printed report is correct, and the original stenographic report and other testimony is incorrect, and that in fact Russell testified in the morning before what was supposed to be the full committee, but with less than a quorum thereof present, or if you have a reasonable doubt as to whether that's the fact or not, you may not convict him. But if you believe beyond a reasonable doubt that he actually testified before at least a quorum of a duly-appointed subcommittee in the afternoon of that day, as I have defined a legally-appointed subcommittee to you, and that the stenographic record and

the other evidence as distinguished from the printed record is correct in this respect, it then wouldn't make any difference whether the printed record remains unamended or not, or that Mr. Moulder was also present or not. For, if [fol. 230] you so believe beyond a reasonable doubt, this element of the offense, that is, that the defendant appeared before a duly-constituted subcommittee, would have been established.

There is this further issue of fact in dispute now, passing from that subject: Whether before such legally-constituted subcommittee, if any, the defendant was asked and refused to answer the questions put to him involved in the respective counts. You have heard the testimony, and you will consider the exhibits with reference to the proceedings, and the asking of the questions and as to who was present, and you have heard the testimony and will consider the exhibits with reference to what answers were given by the defendant. And if you find beyond a reasonable doubt that before such subcommittee, if any, he was asked the questions charged by the government in the respective counts, and that he refused to answer the particular question involved in the particular count that you have under consideration, this element as to such count would be satisfied.

In determining whether the defendant refused to answer the question, you may consider, and should consider, just what took place, and what was said. You may consider the clarity or lack of clarity of the question asked; the defendant's ability or lack of ability to understand the question asked; the opportunity he had or lack of opportunity to answer responsively, having in mind that unless an answer [fol. 231] is responsive to the question, and answers it, it may not be deemed a proper answer. You may consider what he said, indicating whether he refused to answer the question or whether he didn't, and you may consider all other facts and circumstances with reference to that problem. And if you believe beyond a reasonable doubt that as to the particular question involved in the count under discussion, among those three counts, the question charged was put to him, and he refused to answer it, it wouldn't matter on what ground he based that refusal because I charge you that any reason for refusal which is suggested

by the record involving the first amendment wouldn't be a good reason. The fifth amendment rights were not invoked, and it's aside from this case entirely what would have been the situation if the fifth amendment had been invoked. It would be no reason to refuse to answer the question put, if any, on the ground that it didn't have to be answered because of the first amendment, or for some similar reason.

So on that one division, you won't be bothered by anything but the question as to the particular inquiry charged in the count under consideration—did he refuse to answer it or didn't he?

And then in that connection we have one final element: If he refused to answer it, was such refusal a wilful refusal? And I will give you the law with regard to that.

The defendant must have been clearly informed as to the question specified in each count in the indictment, and must [fol. 232] have been aware and been given to understand that the committee demanded his answer notwithstanding his objections, and you cannot convict the defendant on any count unless you find that on that count his refusal to answer the question was deliberate, wilful or intentional. I should put it like this: Unless it was wilful, and wilfulness simply means, in another form, deliberate and intentional.

The word "wilful" does not mean that the refusal or failure to comply must necessarily be for an evil or malicious purpose. That's beside the point. The reason for refusal is immaterial, as long as the refusal was a deliberate and intentional thing rather than a mere accident or oversight or inadvertence, or as a result of misunderstanding. And I have already said that the defendant, merely because the defendant may have misunderstood his rights, and may have thought he had the right to refuse to answer, wouldn't be the type of a misunderstanding I have in mind. Because it was his duty not to intentionally and deliberately refuse to answer the question, if you find the other elements of the offense as I have given them to you were present. The kind of a misunderstanding I have in mind is a situation where he didn't understand that he was required to make an answer; that it hadn't been brought home to him that the committee had overruled his objections and expected him

to answer notwithstanding his objections, or where a failure to answer was due to a misapprehension or misunderstanding of the question itself, or due to accident. And if you find that those latter things, elements, were the determining thing present, or you have a reasonable doubt with regard to that, then you should find the defendant not guilty. But if you believe beyond a reasonable doubt that his refusal, if any, to answer was intentional and deliberate, and with a full understanding that the committee demanded his answers notwithstanding his objections, then that element of the case would be satisfied.

Under the law the defendant is not required to prove his innocence. He is presumed to be innocent of each and all of the offenses charged, and that principle attends him throughout all stages of the trial until, if at all, he is proved guilty beyond a reasonable doubt of the particular charge involved.

I have given you the necessary elements of the offenses charged to the extent they involve the questions of fact in this case, which, merely summarizing, or where the offense, if any, took place. Was it in the District of Columbia? That a legally-constituted subcommittee met; that there was an appearance of the defendant before at least a quorum of that subcommittee, and that he was asked the questions specified in the particular count, and that he wilfully refused to answer.

On these elements, and as to each count, it is the government's burden to prove each and every one of them to your satisfaction and beyond a reasonable doubt before you will [fol. 234] be authorized to return a verdict of guilty, and if it has failed to do it it will be your duty to return a verdict of not guilty on the count or counts concerning which any reasonable doubt exists; but if the government has proved to your satisfaction, and beyond a reasonable doubt, each and all of the material elements I have defined for you, then it will be your duty to return a verdict of guilty as to the count or counts concerning which you have no reasonable doubt.

Reasonable doubt is a doubt based upon reason, arising out of the evidence or lack of evidence in the case. It is not merely an imaginary, capricious or fanciful doubt, but

is such a doubt as in the more serious and weighty affairs of life leads the reasonable mind to hesitate and to be unsure of the truth or validity of a given proposition. It is not necessary that the evidence preclude any and all doubt, whether reasonable or not, or that the proof be to an absolute or mathematical exactness, but it is necessary that the proof be of such a nature as to give you an abiding conviction to a moral certainty of the guilt of the defendant. If you find the defendant guilty beyond a reasonable doubt, it is your duty to convict him on the count or counts concerning which no reasonable doubt exists. If you do not, it is your duty to acquit him on the count or counts concerning which you have a reasonable doubt of his guilt.

Now, when you retire to the jury room you will elect or otherwise select one of your members as foreman. Your [fol. 235] verdict, as you know, must be unanimous. And when you have reached a unanimous verdict you will notify the marshal in charge and he will conduct you back into court as soon as practicable.

When you return to the court—and I mention this so that you may know in what form you will be expected to be prepared to submit your verdict—the clerk will ask the foreman if a verdict has been agreed upon. If the foreman answers in the affirmative, the clerk, in substance, will say, “What say you as to the defendant Norton Anthony Russell on Count 2 of the indictment, guilty or not guilty?” Now, you will have that indictment in there. You should be prepared, or your foreman should be prepared, with your concurrence, to indicate whether you find the defendant guilty or not guilty on Count 2 of the indictment.

The same question will be put separately, “What say you on Count 3 of the indictment, and on Count 4 of the indictment?” And after you have answered to each of those inquiries, guilty or not guilty, through your foreman, then the Court will state what your verdict has been and ask if, “So say you all?” If there’s an assent there, the clerk will state that your verdict is also, on Counts 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, by direction of the Court, not guilty, because those are the counts that have been withdrawn. [fol. 236] I am sure, with that explanation, you will have

no difficulty in arriving at your true verdict, so as to be able to submit it properly to the Court.

The Court: The government may take exceptions.

Mr. Hitz: We have none. We think it's a very full, complete and fair charge.

The Court: Defendant may take its exceptions.

Mr. Freehill: No exceptions.

(At 3:29 o'clock p.m. the jury returned to the courtroom, all parties being present, the following proceedings were had:)

The Court: You may take the verdict of the jury.

The Clerk: Mr. foreman, has the jury agreed upon a verdict?

The Foreman: It has, sir.

VERDICT

The Clerk: What say you as to the defendant, Norton Anthony Russell, on Count 2 of the indictment?

The Foreman: Guilty, sir.

The Clerk: On Count 3?

The Foreman: Guilty, sir.

The Clerk: On Count 4?

The Foreman: Guilty, sir.

[fol. 237] The Court: You may be seated.

The Clerk: Now, members of the jury, your foreman says that you find the defendant, Norton Anthony Russell, guilty on Count 2, guilty on Count 3, guilty on Count 4, and by direction of the Court your verdict is that you find the defendant not guilty on Counts 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. And is that your verdict, so say you each and all?

(Assent.)

The Court: Does either side request an individual poll of the jury?

Mr. Hitz: The government does not.

Mr. Freehill: No, your Honor.

The Court: The verdict may be entered.

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The Court: Gentlemen, I have in mind that counsel for the defendant indicated there were no exceptions to the charge. We did have an understanding in chambers, if you will recall, that your position, as indicated on rulings or requests, would be preserved, and pursuant to that understanding I will note that it is my thought that you did not intend to weigh the position reflected in your statements in chambers.

Mr. Freehill: That is right, your Honor.

The Court: All right.

[fol. 238] Now, have you a suggestion of time for sentence?

Mr. Hitz: Your Honor, might I inquire if the defense may still resort to an exception on appeal with respect to points of law that were raised in prayers for instruction only, and not otherwise reflected?

The Court: That's correct. That's my understanding.

[fol. 239]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,529

NORTON ANTHONY RUSSELL, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the District of Columbia

OPINION—Decided June 18, 1960

Mr. Joseph A. Fanelli, with whom Mr. J. H. Krug was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Messrs. Oliver Basch, United States Attorney, Carl W. Belcher, Lewis Carroll and John D. Lane, Assistant United States Attorneys, were on the brief, for appellee. Mr. Harold D. Rhynedance, Jr., Assistant United States Attorney, also entered an appearance for appellee.

Before Washington, Bastian and Burger, Circuit Judges.

Washington, Circuit Judge: This is a contempt of Congress case, under Section 192 of Title 2, United States Code (1958).

Appellant was convicted, after trial by jury, on three counts of an indictment charging him with refusal to an-
[fol. 240] swer certain questions propounded by a subcommittee of the Committee on Un-American Activities of the House of Representatives. This appeal followed.¹

¹ The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13,464, Gojack v. United States, decided this day.

The first contention advanced by appellant is that he was subpoenaed to appear before the subcommittee in Washington, D. C., solely in order that he might be punished for contempt. He had declined to answer certain questions put to him by a member of the subcommittee at a hearing in Dayton, Ohio, and it seems agreed by all parties that this initial refusal could not have resulted in a contempt citation. But it does not follow that the subcommittee could not thereupon properly summon him to Washington to appear before a tribunal which was empowered to initiate proceedings for contempt, upon his continued refusal to answer. See *Flaxer v. United States*, 358 U.S. 147 at 151 (1958).

Other contentions advanced include these: that the trial court could not decide as a matter of law that the Chairman of the full committee could appoint subcommittees, or decide that such an appointment could properly be made by telephone. Appellant says these matters should have been left to the jury. But we think the legal questions raised were within the trial court's prerogative. The judge decided those questions, and we think he did so correctly. The jury was allowed to make the ultimate decision, under proper instructions, as to whether the defendant-appellant was summoned to appear before a properly-constituted subcommittee. Its verdict indicated that it found that he was, and the evidence was ample to justify its conclusions.

A further contention relates to the pertinency of the questions asked to the subject matter under inquiry. Appellant urges that this was not a question for the judge, [fol. 241] but for the jury. We are constrained by the decision of the Supreme Court in *Sinclair v. United States*, 279 U.S. 263 (1929), and by our decision in *Keeney v. United States*, 94 U.S. App. D.C. 366, 218 F.2d 843 (1954), to say that the matter is for the judge to decide. The judge determined here that the questions were pertinent, and we find no ground on which to disagree.

For these reasons, the judgment of the District Court will be

Affirmed.

[fol. 242]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 13,529
Criminal 1230-54

NORTON ANTHONY RUSSELL, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the
District of Columbia.

Before: Washington, Bastian and Burger, Circuit
Judges.

JUDGMENT—June 18, 1960

This cause came on to be heard on the record on appeal
from the United States District Court for the District of
Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged
by this Court that the judgment of the District Court ap-
pealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Washington.

Dated: June 18, 1960.

[fol. 244] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 245]

SUPREME COURT OF THE UNITED STATES

No. 239, October Term, 1960

NORTON ANTHONY RUSSELL, Petitioner,

VS.

UNITED STATES.

ORDER ALLOWING CERTIORARI—June 19, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 246.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

I N D E X

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 239

NORTON ANTHONY RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-3a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960. The petition for a writ of certiorari was filed on July 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who is indicted by a grand jury composed, in part, of government employees is entitled to dismissal of the indictment or a hearing

on the basis of general allegations that such grand jurors are biased in cases involving Communism.

2. Whether an indictment charging contempt of Congress must state the subject under inquiry and the relationship of the questions asked to that subject.

3. Whether petitioner stated his refusal to answer any question on Communism at the start of the hearing and therefore could not be tried for later refusing to answer specific questions on this subject.

4. Whether the trial court properly held that, as a matter of law, the subcommittee was properly constituted.

5. Whether the trial court erred (a) in holding, as matters of law, that the inquiry was for a legislative purpose and that the questions in issue were pertinent to that inquiry, or (b) in its instructions to the jury.

STATUTE INVOLVED

The statute involved is 2 U.S.C. 192, which appears at page 4 of the petition.

STATEMENT

Petitioner was indicted on sixteen counts, each of which charged him with refusing to answer a different question put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives (J.A. 3-6). He was convicted on counts 2, 3, and 4¹ (J.A. 236-237), and sentenced to

¹The trial court directed acquittal on the remaining counts after they were abandoned by the government because the subcommittee failed to order petitioner to answer these other questions after his initial refusal to answer (J.A. 185, 220).

thirty days' imprisonment and a fine of five hundred dollars on each count, with the imprisonment sentences to run concurrently (J.A. 40). On appeal, petitioner's conviction was affirmed' (Pet. App. 1a-3a).

The pertinent facts may be summarized as follows:

Petitioner was called on September 15, 1954, before a subcommittee of the House Committee on Un-American Activities holding hearings in Dayton, Ohio, as part of their investigation into Communist activity in the Dayton area (J.A. 84-85).¹ Although the subcommittee conducting the Dayton hearings was composed of three members, only the chairman was present when petitioner appeared (J.A. 85, 149). Counsel for the subcommittee testified that petitioner was called, despite the fact that a quorum was not present and the subcommittee was not a validly operating subcommittee, because there was some prospect of petitioner's being a "cooperative" witness (J.A. 153).

Petitioner was not, however, such a witness. He claimed a First Amendment privilege when asked any questions relating to Communism and its specific activities then under investigation (J.A. 85-87). Upon the petitioner's refusal to answer such questions, counsel for the Committee excused the witness (J.A. 87-

¹The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases, until after the decision of this Court in *Barenblatt v. United States*, 360 U.S. 109. See the government's Br. in Opp. in *Deutsch v. United States*, No. 233, this Term, pp. 8-9.

²A full statement of the purposes of these hearings is provided in Government Exhibit 3, set forth at J.A. 51-57.

88). Though the witness was not kept under subpoena (J.A. 88), the intention of counsel was to report to the Committee the other questions to be asked petitioner and to ask for a decision as to whether or not petitioner should be recalled (J.A. 88).

Committee counsel thereafter reported to the Committee that he felt that petitioner had been influenced at Dayton by the fact that his appearance was not before a legally constituted subcommittee and that he might cooperate if called before the Committee in Washington (J.A. 158). Moreover, petitioner's refusal to testify left a void, or, as counsel for the Committee characterized it, a "missing link" (J.A. 157, 176) in the testimony received from other witnesses during the Dayton hearings (J.A. 157, 159-160). The testimony already received established two areas of Communist activity, the connection between which would provide a fuller explanation of the purposes and methods of the Communist Party (J.A. 158-161). Therefore, the Committee was particularly anxious to obtain the information which it felt petitioner could supply (J.A. 157, 172, 176, 178-179), and he was subpoenaed to appear in Washington on November 17, 1964 (J.A. 44, 117).

Petitioner testified at Washington during an afternoon session conducted by a three-man subcommittee (J.A. 118, 123) which had been appointed during the noon recess by the Committee chairman (J.A. 117-118, 120). Notice of the appointment, which the chairman had made by telephone (J.A. 120), was entered in the record of the hearings at the beginning of the session at which petitioner testified (J.A. 168;

G. Ex. 6), and announcement of this fact was made at the hearing (J.A. 168). At no time during the course of the hearing did petitioner object to the composition or appointment of the subcommittee before which he appeared (J.A. 169-185).

Petitioner was questioned concerning the activities about which he had been interrogated in Dayton (J.A. 169-185). He persisted in his refusal to answer the Committee counsel's questions concerning his knowledge of the Communist activities being investigated and invoked the First Amendment as to each such question (see, e.g., J.A. 174, 177). The questions he refused to answer included whether he joined the Communist Party in the mid-nineteen-forties (count two) (J.A. 178-179); whether Herbert Reed had anything to do with his entering the party (count three) (J.A. 180); and whether he had any knowledge of a party group in Yellow Springs (count four) (J.A. 182-183). Despite explanation of the importance of his testimony in the investigation of Communist activities at Antioch College (J.A. 172-173, 176-180) and rejection of his legal position (J.A. 175, 181), petitioner continued his refusal to answer these questions after being urged (J.A. 175, 181) and, finally, directed (J.A. 179, 180, 183) to answer.

ARGUMENT

1. Petitioner claims (Pet. 14-15) that the indictment should have been dismissed due to the possible bias of thirteen members of the grand jury who were employees of the Federal Government or District of Columbia, or that a hearing should have been granted

on this issue.* This contention is without substance.

The grand jury is a purely accusatory body which does not decide the question of guilt or innocence, but merely whether the defendant should be remanded for trial. *Hale v. Henkel*, 201 U.S. 43, 65. This has led to the traditional and continued reluctance of the courts to scrutinize grand jury proceedings for at least two reasons. First, the defendant is guaranteed detailed and elaborate protection, both at the trial and appellate levels, as to the proceeding which determines his guilt or innocence. Second, if the courts allowed defendant to challenge various aspects of the grand jury's actions, the result would be a second elaborate proceeding—besides the trial itself—before guilt or innocence was actually determined. This would mean considerable delay and inefficiency in the administration of criminal law. See Swan, C. J., in *United States v. Remington*, 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907.¹

Since the courts so rarely interfere with grand jury proceedings, the federal courts have held that bias in grand jurors does not invalidate an indictment unless, perhaps, the showing of bias in particular grand jurors is specific, individual, and strong. See, e.g., *Cleveland v. United States*, 146 F. 2d 730, 732-733 (C.A. 10), affirmed, 329 U.S. 14; *United States v.*

*Petitioner did not argue this issue in the court of appeals because of "the present state of the authorities in this Circuit" but purported to reserve the issue. The court did not advert to the question.

¹These reasons are not applicable with regard to claims of bias in petit jurors. Therefore, *Morford v. United States*, 339 U.S. 258, and *Dennis v. United States*, 339 U.S. 182, on which petitioner relies (Pet. 14-15), do not sustain his position.

Remington, supra; *Quinn v. United States*, 203 F. 2d 20, 25 (C.A.D.C.), reversed on other grounds, 349 U.S. 155; *Emspak v. United States*, 203 F. 2d 54, 56, 58-60 (C.A.D.C.), reversed on other grounds, 349 U.S. 190; *United States v. Williams*, Fed. Cas. No. 16,716 (C.C.D. Minn.); *United States v. Rintelen*, 235 Fed. 787, 789 (S.D.N.Y.); *United States v. Smyth*, 104 F. Supp. 283, 300-301 (N.D. Calif.).* And in *Dennis v. United States*, 339 U.S. 162, 168, 172, this Court indicated that specific demonstration of bias and fear—not mere claims that the security program intimidated many government employees—was necessary before even a petit juror could be disqualified. Similarly, a defendant is not entitled to a hearing with respect to the grand jury unless, at the least, his motion and accompanying affidavit allege specific facts which, if proved, would constitute the strong showing of bias

* The decisions of this Court in which indictments have been invalidated for reasons relating to the composition of the grand jury have all involved the systematic exclusion from the panel of entire classes of persons, such as women (*Ballard v. United States*, 329 U.S. 187), and Negroes (*Cassell v. Texas*, 339 U.S. 282). These cases turn principally on the view that the grand juries chosen are unrepresentative of the community, and therefore are not proper grand juries. It is plain that it is not merely general prejudice against the accused's class that is involved, because the Court has chosen as its remedy not to require that all persons prejudiced against the class be excluded or even that the excluded class must be represented on every grand jury returning an indictment against a member of that class, but only to insure that the selection of the panels be without arbitrary exclusion. It has never been suggested by the Court that an accused might be entitled to have an entire class systematically excluded from the panel or a particular jury—the precise claim petitioner makes here.

Dayton before moving to Yellow Springs in 1948; whether petitioner was in the Communist Party at any time prior to moving to Yellow Springs in 1948; and whether petitioner is a member of the Communist Party (JA 86-87). After these declinatures, Committee counsel announced: "I have no further questions" (JA 87); and petitioner was completely excused (JA 88).

Although the Subcommittee at Dayton had started with all three members present on the day of petitioner's appearance, there was only one member left and present by the time of petitioner's appearance to hear his testimony (JA 85; 149). Committee counsel was aware of this lack of a legal quorum during petitioner's appearance, and had it in mind when he broke off his questioning of petitioner (JA 88; 150).

Committee counsel testified at the trial. At the close of petitioner's appearance in Dayton, he had further questions and expected to get a Committee ruling as to recalling petitioner (JA 88). So he testified; although at Dayton he announced having no further questions, and permitted petitioner to be completely excused (JA 87-88). Committee counsel thought that petitioner might not claim his First Amendment privilege if called to testify again, because when served with a new subpoena to appear in Washington in November petitioner showed a desire to get in touch with a Committee staff member (JA 89). However, the subpoena was not served until after the making of the decision to subpoena petitioner for his appearance in Washington; and petitioner's desire for a conference was to change the stated time for his appearance (JA 90).

At the time of petitioner's appearance in Washington, the Chairman of the Committee group which heard him announced that the shortness of time allotted to the Dayton hearings had "resulted in the necessity of continuing that hearing by calling several witnesses for further testimony" (JA 93). However, three witnesses had testified at Dayton after petitioner had testified; and one of them was a volunteer witness, unexpected and uninvited, who was permitted to testify at his own request after the hearings had already been closed (JA 93-94).

Two witnesses at Dayton, other than petitioner, had declined to answer questions on a First Amendment claim of privilege. These declinations were in the presence of a legal quorum. Neither witness was called to Washington for further testimony. Both were cited for contempt at Dayton and indicted there (JA 95-96). Petitioner was the only Dayton witness called for a further appearance at Washington; he was the only Dayton witness who claimed a First Amendment privilege in the absence of a legal quorum (JA 109).

At the Washington hearing, the petitioner claimed precisely the same First Amendment privilege against forced disclosure of his "opinions and political beliefs and associations" (JA 91) as he had claimed at Dayton. And he made that claim at the very outset of the hearing in declining to answer the very first question which concerned communism (JA 92). The taking of this stand by petitioner in Washington ended any hopes that he "might cooperate with the Committee" and answer questions concerning communism (JA 158). Immediately upon petitioner's general refusal at the outset to answer questions

concerning communism, the Chairman, Mr. Clardy, sought and obtained a specific disclaimer from petitioner of any reliance on the Fifth Amendment (JA 91-92); and, then, Committee counsel, in covering the same field of questioning as at Dayton, went on to ask the sixteen questions which provided the counts in the indictment (JA 4-6; 86-87; 92; and 169-185). It was believed by the Committee and Committee counsel that at Washington they had a legally competent body to receive petitioner's declinature (JA 90).

Upon the foregoing facts, petitioner moved for a directed verdict on the ground that "the proof fails to show that in questioning defendant the Committee was pursuing a legislative purpose [but] rather, the proof shows that defendant was called to testify in order to punish him for contempt" (JA 28), and upon the further ground that "the proof shows that if defendant committed any crime of contempt, the crime was committed when, before any of the questions specified in the indictment, he made it clear that he was not going to answer any questions involving Communist Party membership or activities on his part" (JA 28). The motion was denied (JA 197). The specific request of petitioner for a charge to the jury which would submit the issue of whether petitioner was called to Washington for punishment or legislative aid was denied (JA 34-35). The Court informed the jury that as a matter of law the "inquiry was for a legislative purpose" (JA 225).

We turn to a summarization of the case on the two aspects (authority to appoint and action taken to appoint) of whether the three Congressmen, chaired by Mr. Clardy, before whom petitioner appeared in Washington were legally appointed as a Subcommittee

of the House Committee on Un-American Activities. The summary follows.

The Rules of the House of Representatives, applicable to the House Un-American Activities Committee, provide: "A Committee may adopt rules under which it will exercise its functions . . . and may appoint subcommittees" (JA 189). Committee counsel testified that there was no rule of the House on "who should be the one to appoint members of a subcommittee" (JA 146). The practice of the Committee was for the Chairman of the Committee to appoint subcommittees; and, in conformity with that practice, the Committee in January 1953 adopted a resolution authorizing the Chairman to appoint subcommittees (JA 190). So Committee counsel testified; but no resolution was offered. Neither the House nor the Committee has any rule with respect to the method in which the Chairman should appoint subcommittees (JA 189). The practice of the Chairman was to appoint subcommittees by personal interview or telephone.

Petitioner urged to no avail that the question of the authority of the Committee Chairman to appoint subcommittees was one of fact, and that hence the foregoing evidence should be heard by the jury (JA 139; 145; 204). The Court excluded the jury (JA 126; 139; 145); refused a specific request for a charge submitting the issue of the Chairman's authority to appoint subcommittees for jury determination (JA 33); and informed the jury as a matter of law that the Committee Chairman was authorized to appoint subcommittees, and could do so by telephone (JA 224).

The group before which petitioner appeared in Washington had Mr. Clardy as Chairman, with

Messrs. Scherer and Walter as ordinary members (JA 125-126; 168). All of the evidence on whether this Clardy group had been appointed as a subcommittee by the Chairman came from two Government witnesses, Messrs. Scherer and Tavenor. In rejection of petitioner's view that all of his testimony should be passed on by the jury (JA 42-43; 44), Mr. Tavenor, Committee counsel, testified both in and out of the presence of the jury. He testified that at an executive Committee hearing in August 1954, the Chairman appointed a subcommittee of *Congressman Scherer as Chairman* with Messrs. Clardy and Walter as ordinary members to hold hearings at Dayton at any time prior to *three weeks before the election in the beginning of November* (JA 161; 166). This was out of the presence of the jury (JA 167). In the presence of the jury (JA 167), Government counsel emphasized "Clardy," "Scherer" and "Walter" as the names of the three man group before whom petitioner appeared at Washington, and merely asked: "Are Congressmen Clardy, Scherer and Walter the same members of the Un-American Activities Committee which you state were appointed by Chairman Velde on August the 9th, 1954, at the time that the full committee authorized taking hearings?" To which Mr. Tavenor simply answered: "They are, yes" (JA 168).

Mr. Scherer, a member of the group before which petitioner appeared at Washington in November 1954, testified on cross-examination that the Committee Chairman had telephoned him during the noon recess on the day of petitioner's appearance "and said that he was appointing Mr. Clardy and Mr. Walter and myself, as the Chairman of the subcommittee, for the

purpose of conducting the hearings that afternoon" (JA 120). On re-direct examination, Mr. Scherer, under the guidance of Government counsel, also testified that Mr. Clardy was to be Chairman of the subcommittee for the purpose of conducting the hearings that afternoon (JA 124).

Petitioner's motion for a directed verdict because of the lack of a sufficient showing of a properly constituted body (JA 27) was denied (JA 197). The Court in its own charge on this issue stated that the jury need only find that "the Chairman of the full committee had theretofore designated and appointed Representatives Clardy, Scherer and Walter as subcommittee for the purpose of conducting such hearings" (JA 226); and, further informed the jury that they could find such appointment either in the executive session of the Committee in August or by telephone on the day of petitioner's appearance (JA 228). In this way with Mr. Scherer testifying that he had been appointed by telephone on the day of petitioner's appearance to a subcommittee first stated by him to be with him as Chairman, and then stated by him to be with Mr. Clardy as Chairman, the trial judge permitted, indeed encouraged, the jury to find the appointment of the *Washington* subcommittee with Clardy as Chairman from Mr. Tavener's testimony of the August appointment of a subcommittee, although the jury was kept from hearing that the August appointment was of a *Dayton* subcommittee with Scherer as Chairman.

Throughout the trial petitioner advanced the view that where, as here (JA 19ff; 113ff; 132ff; 199ff; 244ff; and 247ff), the evidence on pertinency was not limited to the transcript of petitioner's appearance but con-

sisted also of the testimony of witnesses, the issue of pertinency was for the jury (JA 9; 139; 34; and 195). The District Court rejected this contention (JA 43; 187; and 195); and charged the jury that the questions asked of petitioner were pertinent as a matter of law (JA 224-225).

With respect to the total history of the Committee petitioner offered evidence to show its continued purpose of exposure of individuals rather than legislative purpose. The offer was denied (JA 211-212).

A jury charge was specifically requested to read:

Where the facts proven to your satisfaction by the prosecution are susceptible of two inferences, one pointing to innocence and the other pointing to guilt, it is your duty to adopt the inference pointing to innocence, even though the inference pointing to guilt may be equally weighty.

It was refused (JA 37; 209; 213ff).

On the jury's verdict of guilty as to Counts Two, Three, and Four, the Court sentenced petitioner on each of the three counts. The sentence on each count was thirty days' imprisonment and a fine of Five Hundred Dollars, "said sentences on Counts Two, Three and Four to run concurrently" (JA 40). The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The trial court's failure to dismiss the indictment or grant a hearing on the bias of the Government employees on the grand jury, sanctioned by the affirmance of petitioner's conviction, is probably in conflict with *Morford v. United States*, 339 U.S. 258, and appears to constitute a misapplication of *Dennis*

v. *United States*, 339 U.S. 162. *Dennis* rejected the disqualification of jurors merely because they were Government employees and a Government loyalty program had been in existence for three months. *Morford* by *per curiam* opinion reversed the affirmance of a conviction where petitioner had been denied an opportunity to show the actual biasing influence of such a program on Government employees. Your petitioner showed by the uncontradicted affidavits of experts that such employees, after seven years of the pressures of loyalty-security programs, are generally biased against a defendant in a case involving communism, and was denied the requested opportunity to prove further that the thirteen Government employee grand jurors in this case were actually biased against him. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Morford*, at p. 259, quoting from *Dennis*.

Morford and *Dennis* concerned petit jurors. But on the point here grand jurors should stand no differently; for, if they be biased, the Constitutional protection of a grand jury against the prosecutor's zealously becomes meaningless ritual.

2. Whether an indictment for contempt should be required to state what subject was under inquiry and the relationship to that subject of the questions asked presents an important question of federal law which has not been but should be settled by this Court. Failure to specify the subject under inquiry and the pertinence of the questions is the standard practice of the Government with respect to contempt indictments. Such failure is seriously prejudicial to a defendant's right, made explicit in Rule 7(c) of the Federal Rules

of Criminal Procedure, to have "a plain, concise and definite written statement of the essential facts constituting the offense charged." See *Cole v. Arkansas*, 333 U.S. 196, 201; and *Kraus & Bros. v. United States*, 327 U.S. 614. Here, for example, petitioner throughout his trial was compelled to guess as to what subject under inquiry the grand jury had in mind, as the prosecutor introduced some sixty pages of testimony directed to showing at least fifteen different subjects as being the subject under inquiry.² Yet this Court has stated with respect to contempt prosecutions that "it [is] incumbent upon the United States to plead and show that the question pertained to some matter under investigation." See *Sinclair v. United States*, 279 U.S. 263, 296-297.

² These included: Communist Party activities in the labor movement in industry, and educational institutions (JA 47); Communist participation in the Univis Lens Corporation strike (JA 48); Communist leadership in the United Electrical, Radio and Machine Workers of America (JA 48); The investigating and revealing of the Communist conspiracy (JA 52); Complaints and requests for an investigation from the Dayton-Yellow Springs area (JA 57); The identification of individual Communists (JA 58); The identification of petitioner by another witness as a member in the past of the Communist Party (JA 66); The identification by a witness called Strunk of a man called Herbert Reed as an officer in the Communist Party (JA 68); Legislative recommendations on the subject of capital punishment for peace time espionage, immunity for certain witnesses, the admissibility of wiretapping evidence, and the breaking of Communist Party control over certain labor unions (JA 80; 83); A legislative recommendation on the adoption of procedures to withdraw military commissions from those who claim the Fifth Amendment (JA 82-83); A legislative recommendation on the outlawing of the Communist Party (JA 83); A legislative recommendation on requiring Government contractors to make out an affidavit of nonmembership (JA 83); and Communist Party infiltration at Antioch College for the particular years between 1942 and 1945 (JA 154-157).

The affirmance by the Court of Appeals of the conviction of petitioner on an indictment which sheds no light on the subject under inquiry and pertinence is in conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Lamont*, 236 F.(2) 312. This precise question of the validity of such an indictment is now before the Court by way of its grant of certiorari in *Bruden v. United States*, October Term, 1959, No. 779.

3. The Court below holds a number of rather plainly factual questions to be matters of law for the judge—ascertainment of the subject under inquiry; pertinence to that subject of the questions asked; whether appearance was compelled in order to punish or in aid of a legislative purpose; and the authority or lack of authority of a Committee Chairman to appoint subcommittees. How much invalid encroachment upon the right of a defendant in a contempt proceeding to a jury trial is thus involved is a question which should be delimited by this Court.

The Court of Appeals felt itself "constrained" by the decision of this Court in *Sinclair v. United States*, 279 U.S. 163, to hold that pertinence is a question of law for the trial judge, even though pertinence here rested largely on the probative value of the oral testimony of Government witnesses. In this aspect of its decision, the Court of Appeals has misapplied the *Sinclair* case, and is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Orman v. United States*, 207 F.(2) 148. The Third Circuit Court of Appeals sums up the matter succinctly in *Orman* at p. 155:

Courts have said the question is one of law . . . But in *Sinclair* the Supreme Court explained that

the "question of pertinency . . . was rightly decided by the Court as one of law. It *did not depend upon the probative value of evidence.*" [Emphasis added] In the instant case, however, evidence *aliunde* was introduced to prove pertinency. The weight and probative value of this evidence was for the jury, particularly since pertinency was one element of the criminal offense.

The precise question of pertinence for judge or jury is now before the Court by its grant of certiorari in *Braden v. United States*, October Term, 1959, No. 779.

The affirmance by the Court of Appeals of petitioner's conviction based on a conclusive presumption of legislative purpose, and its refusal to consider the evidence showing the purpose of the Subcommittee to have been punishment, appear to be inconsistent with the approach of this Court in its opinions in *McGrain v. Dougherty*, 273 U.S. 135, and *Sinclair v. United States*, 349 U.S. 155. In those cases, this Court carefully reviewed the record evidence before passing on charges of punishment rather than aid of legislation. See *McGrain* at pp. 179-180; and *Sinclair* at pp. 295ff. Similar, but not identical questions of punishment or legislative purpose are now before the Court by its grants of certiorari in *Wilkinson v. United States*, October Term, 1959, No. 703, and *Braden v. United States*, October Term, 1959, No. 779; and cf. the first question presented in *McPhaul v. United States*, October Term, 1959, No. 674, certiorari granted.

Finally, the failure of the Court of Appeals to reverse petitioner's conviction in this case where he had been denied a charge of priority of innocence over guilt as between equal inferences on close issues is

in conflict with the decision of the Second Circuit Court of Appeals in *Bechner v. United States*, 5 F.(2) 45.

4. In our day, we have witnessed many excesses by Congressional committees, sufficient to remind the writer of De Tocqueville's dictum that a hundred tyrants are no better than one. Many of the excesses are beyond the corrective powers of the Judiciary. But here we respectfully suggest that this Court can, and should correct an abuse of power, expressly permitted by the Court of Appeals, which leads to the one-man runaway subcommittee. This Court can, and should hold that Committee authority to its Chairman to appoint subcommittees without specification of the method must be held in law to be limited to a method of appointment more formal and definitive than a telephone call without any record made. Cf. *Ex Parte Frankfeld*, 32 F. Supp. 915, 916 (D.C.D.C., 1940). No less would seem to be required when the liberties and privileges of citizens of the United States are affected.

5. The decision of the Court of Appeals is in conflict with *Costello v. United States*, 198 F.(2) 200 (C.C.A. 2, 1952), cert. den. 344 U.S. 874, in the failure here to reverse petitioner's conviction because the contempt by him, if any, was committed when, before any of the indictment questions concerned with communism, he made it clear that he was not going to answer any such questions.

6. As has already been pointed out by petitioner, in *Braden v. United States*, October Term, 1959, No. 779, the court's decision in *Barenblatt v. United States*, 360 U.S. 109, considered much legislative history in delineating the scope of authority conferred

upon the Committee by H. Res. 5. But the Court did not pass upon whether H. Res. 5 as a criminal statute in conjunction with 2 U.S.C. 192, is sufficiently clear to a witness to avoid violation of the Fifth Amendment, in the light of *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 458, which requires a criminal statute to be clear on its face. And see also, *Winters v. New York*, 333 U.S. 507.

7. On the question of whether, in the light of the total history of the House Committee on Un-American Activities, this Court should not reconsider its decision in *Barenblatt, supra*, we respectfully refer to and adopt the thorough and able argument and documentation of counsel for the petitioner in *Braden v. United States*, October Term, 1959, No. 779, petition, p. 16.

As we have noted, some but not all of the questions presented by this petition are now before the Court in *Braden*, *Wilkinson*, and *McPhaul*. Briefs on the merits have not yet been filed in those three cases. A grant of certiorari now in this case would, without unduly delaying decision in those three cases, provide an opportunity for one contemporaneous consideration and decision of all the important questions, conflicts, and misinterpretations of this Court's decisions which now require settlement by this Court for the guidance of the lower Federal Courts in contempt cases. Should the Court feel otherwise, we respectfully request that decision on our petition be withheld until the Court decides *Braden*, *Wilkinson*, and *McPhaul*; for our petition presents some questions identical with some of the questions presented in those three cases.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

JOSEPH A. FANELLI

Attorney for Petitioner

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 13,529

NORTON ANTHONY RUSSELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

Decided June 18, 1960

Mr. Joseph A. Fanelli, with whom *Mr. J. H. Krug* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Carl W. Belcher*, *Lewis Carroll* and *John D. Lane*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. Harold D. Rhynedance, Jr.*, Assistant United States Attorney, also entered an appearance for appellee.

Before **WASHINGTON, BASTIAN** and **BURGER**, *Circuit Judges*.

WASHINGTON, Circuit Judge: This is a contempt of Congress case, under Section 192 of Title 2, United States Code (1958).

Appellant was convicted, after trial by jury, on three counts of an indictment charging him with refusal to answer certain questions propounded by a subcommittee of the Committee on Un-American Activities of the House of Representatives. This appeal followed.¹

The first contention advanced by appellant is that he was subpoenaed to appear before the subcommittee in Washington, D. C., solely in order that he might be punished for contempt. He had declined to answer certain questions put to him by a member of the subcommittee at a hearing in Dayton, Ohio, and it seems agreed by all parties that this initial refusal could not have resulted in a contempt citation. But it does not follow that the subcommittee could not thereupon properly summon him to Washington to appear before a tribunal which was empowered to initiate proceedings for contempt, upon his continued refusal to answer. See *Flaxer v. United States*, 358 U.S. 147 at 151 (1958).

Other contentions advanced include these: that the trial court could not decide as a matter of law that the Chairman of the full committee could appoint subcommittees, or decide that such an appointment could properly be made by telephone. Appellant says these matters should have been left to the jury. But we think the legal questions raised were within the trial court's prerogative. The judge decided those questions, and we think he did so correctly. The jury was allowed to make the ultimate decision, under proper instructions, as to whether the defendant-appellant was summoned to appear before a properly-constituted subcommittee. Its verdict indicated that it found that he was, and the evidence was ample to justify its conclusions.

¹ The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13,464, *Gojack v. United States*, decided this day.

A further contention relates to the pertinency of the questions asked to the subject matter under inquiry. Appellant urges that this was not a question for the judge, but for the jury. We are constrained by the decision of the Supreme Court in *Sinclair v. United States*, 279 U.S. 263 (1929), and by our decision in *Keeney v. United States*, 94 U.S.App.D.C. 366, 218 F.2d 843 (1954), to say that the matter is for the judge to decide. The judge determined here that the questions were pertinent, and we find no ground on which to disagree.

For these reasons, the judgment of the District Court will be

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 239

NORTON ANTHONY RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-3a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960. The petition for a writ of certiorari was filed on July 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who is indicted by a grand jury composed, in part, of government employees is entitled to dismissal of the indictment or a hearing

on the basis of general allegations that such grand jurors are biased in cases involving Communism.

2. Whether an indictment charging contempt of Congress must state the subject under inquiry and the relationship of the questions asked to that subject.

3. Whether petitioner stated his refusal to answer any question on Communism at the start of the hearing and therefore could not be tried for later refusing to answer specific questions on this subject.

4. Whether the trial court properly held that, as a matter of law, the subcommittee was properly constituted.

5. Whether the trial court erred (a) in holding, as matters of law, that the inquiry was for a legislative purpose and that the questions in issue were pertinent to that inquiry, or (b) in its instructions to the jury.

STATUTE INVOLVED

The statute involved is 2 U.S.C. 192, which appears at page 4 of the petition.

STATEMENT

Petitioner was indicted on sixteen counts, each of which charged him with refusing to answer a different question put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives (J.A. 3-6). He was convicted on counts 2, 3, and 4¹ (J.A. 236-237), and sentenced to

¹The trial court directed acquittal on the remaining counts after they were abandoned by the government because the subcommittee failed to order petitioner to answer these other questions after his initial refusal to answer (J.A. 185, 220).

thirty days' imprisonment and a fine of five hundred dollars on each count, with the imprisonment sentences to run concurrently (J.A. 40). On appeal, petitioner's conviction was affirmed' (Pet. App. 1a-3a).

The pertinent facts may be summarized as follows:

Petitioner was called on September 15, 1954, before a subcommittee of the House Committee on Un-American Activities holding hearings in Dayton, Ohio, as part of their investigation into Communist activity in the Dayton area (J.A. 84-85).² Although the subcommittee conducting the Dayton hearings was composed of three members, only the chairman was present when petitioner appeared (J.A. 85, 149). Counsel for the subcommittee testified that petitioner was called, despite the fact that a quorum was not present and the subcommittee was not a validly operating subcommittee, because there was some prospect of petitioner's being a "cooperative" witness (J.A. 153).

Petitioner was not, however, such a witness. He claimed a First Amendment privilege when asked any questions relating to Communism and its specific activities then under investigation (J.A. 85-87). Upon the petitioner's refusal to answer such questions, counsel for the Committee excused the witness (J.A. 87-

² The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases, until after the decision of this Court in *Barenblatt v. United States*, 360 U.S. 109. See the government's Br. in Opp. in *Deutch v. United States*, No. 233, this Term, pp. 8-9.

³ A full statement of the purposes of these hearings is provided in Government Exhibit 3, set forth at J.A. 51-57.

86). Though the witness was not kept under subpoena (J.A. 88), the intention of counsel was to report to the Committee the other questions to be asked petitioner and to ask for a decision as to whether or not petitioner should be recalled (J.A. 88).

Committee counsel thereafter reported to the Committee that he felt that petitioner had been influenced at Dayton by the fact that his appearance was not before a legally constituted subcommittee and that he might cooperate if called before the Committee in Washington (J.A. 158). Moreover, petitioner's refusal to testify left a void, or, as counsel for the Committee characterized it, a "missing link" (J.A. 157, 176) in the testimony received from other witnesses during the Dayton hearings (J.A. 157, 159-160). The testimony already received established two areas of Communist activity, the connection between which would provide a fuller explanation of the purposes and methods of the Communist Party (J.A. 158-161). Therefore, the Committee was particularly anxious to obtain the information which it felt petitioner could supply (J.A. 157, 172, 176, 178-179), and he was subpoenaed to appear in Washington on November 17, 1954 (J.A. 44, 117).

Petitioner testified at Washington during an afternoon session conducted by a three-man subcommittee (J.A. 118, 123) which had been appointed during the noon recess by the Committee chairman (J.A. 117-118, 120). Notice of the appointment, which the chairman had made by telephone (J.A. 120), was entered in the record of the hearings at the beginning of the session at which petitioner testified (J.A. 168;

G. Ex. 6), and announcement of this fact was made at the hearing (J.A. 168). At no time during the course of the hearing did petitioner object to the composition or appointment of the subcommittee before which he appeared (J.A. 169-185).

Petitioner was questioned concerning the activities about which he had been interrogated in Dayton (J.A. 169-185). He persisted in his refusal to answer the Committee counsel's questions concerning his knowledge of the Communist activities being investigated and invoked the First Amendment as to each such question (see, *e.g.*, J.A. 174, 177). The questions he refused to answer included whether he joined the Communist Party in the mid-nineteen-forties (count two) (J.A. 178-179); whether Herbert Reed had anything to do with his entering the party (count three) (J.A. 180); and whether he had any knowledge of a party group in Yellow Springs (count four) (J.A. 182-183). Despite explanation of the importance of his testimony in the investigation of Communist activities at Antioch College (J.A. 172-173, 176-180) and rejection of his legal position (J.A. 175, 181), petitioner continued his refusal to answer these questions after being urged (J.A. 175, 181) and, finally, directed (J.A. 179, 180, 183) to answer.

ARGUMENT

1. Petitioner claims (Pet. 14-15) that the indictment should have been dismissed due to the possible bias of thirteen members of the grand jury who were employees of the Federal Government or District of Columbia, or that a hearing should have been granted

on this issue.* This contention is without substance.

The grand jury is a purely accusatory body which does not decide the question of guilt or innocence, but merely whether the defendant should be remanded for trial. *Hale v. Henkel*, 201 U.S. 43, 65. This has led to the traditional and continued reluctance of the courts to scrutinize grand jury proceedings for, at least two reasons. First, the defendant is guaranteed detailed and elaborate protection, both at the trial and appellate levels, as to the proceeding which determines his guilt or innocence. Second, if the courts allowed defendant to challenge various aspects of the grand jury's actions, the result would be a second elaborate proceeding—besides the trial itself—before guilt or innocence was actually determined. This would mean considerable delay and inefficiency in the administration of criminal law. See *Swan, C. J.*, in *United States v. Remington*, 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907.*

Since the courts so rarely interfere with grand jury proceedings, the federal courts have held that bias in grand jurors does not invalidate an indictment unless, perhaps, the showing of bias in particular grand jurors is specific, individual, and strong. See, e.g., *Cleveland v. United States*, 146 F. 2d 730, 732-733 (C.A. 10), affirmed, 329 U.S. 14; *United States v.*

* Petitioner did not argue this issue in the court of appeals because of "the present state of the authorities in this Circuit" but purported to reserve the issue. The court did not advert to the question.

* These reasons are not applicable with regard to claims of bias in petit jurors. Therefore, *Morford v. United States*, 339 U.S. 258, and *Dennis v. United States*, 339 U.S. 162, on which petitioner relies (Pet. 14-15), do not sustain his position.

Remington, supra; *Quinn v. United States*, 203 F. 2d 20, 25 (C.A.D.C.), reversed on other grounds, 349 U.S. 155; *Emspak v. United States*, 203 F. 2d 54, 56, 58-60 (C.A.D.C.), reversed on other grounds, 349 U.S. 190; *United States v. Williams*, Fed. Cas. No. 16,716 (C.C.D. Minn.); *United States v. Rintelen*, 235 Fed. 787, 789 (S.D.N.Y.); *United States v. Smyth*, 104 F. Supp. 283, 300-301 (N.D. Calif.).^{*} And in *Dennis v. United States*, 339 U.S. 162, 168, 172, this Court indicated that specific demonstration of bias and fear—not mere claims that the security program intimidated many government employees—was necessary before even a petit juror could be disqualified. Similarly, a defendant is not entitled to a hearing with respect to the grand jury unless, at the least, his motion and accompanying affidavit allege specific facts which, if proved, would constitute the strong showing of bias

^{*} The decisions of this Court in which indictments have been invalidated for reasons relating to the composition of the grand jury have all involved the systematic exclusion from the panel of entire classes of persons, such as women (*Ballard v. United States*, 329 U.S. 187), and Negroes (*Cassell v. Texas*, 339 U.S. 282). These cases turn principally on the view that the grand juries chosen are unrepresentative of the community, and therefore are not proper grand juries. It is plain that it is not merely general prejudice against the accused's class that is involved, because the Court has chosen as its remedy not to require that all persons prejudiced against the class be excluded or even that the excluded class must be represented on every grand jury returning an indictment against a member of that class, but only to insure that the selection of the panels be without arbitrary exclusion. It has never been suggested by the Court that an accused might be entitled to have an entire class systematically excluded from the panel or a particular jury—the precise claim petitioner makes here.

necessary, at the least, for dismissal of the indictment. See *Quinn v. United States, supra*; *Emspak v. United States, supra*.

Under these standards of juror-bias (assuming that a grand jury can ever be challenged for bias), the allegations in the present record (J.A. 9-31) were clearly insufficient to warrant either dismissing the indictment or holding a hearing. The "proof" offered in support of the motion—which was substantially the same as that found insufficient in *Quinn* and *Emspak* to dismiss the indictment or require a hearing—amounted to no more than opinions (not factual evidence) that there existed among government employees in general such a "climate of fear" of loss of employment as security risks as to make it likely that any individual employee of the government would be afraid to vote against the return of an indictment in any case which was in any way connected with charges of Communism. But this is neither a showing of, nor an offer to show by proper evidence, specific individual bias in particular grand jurors which is the only kind of showing which could possibly suffice to invalidate an indictment.'

2. Petitioner attacks (Pet. 15-17) the indictment on the ground that it failed to state what subject was under inquiry and the relationship of the questions

' Petitioner's suggestion (J.A. 19-31) that by calling the grand jurors themselves he will be able to show their particular bias and fear is obviously no more than a fishing expedition. His general claims certainly cannot give him the right to conduct a sweeping investigation into the attitudes and psychology of all the government-employee-jurors in the mere hope of finding something more definite. See *United States v. Smyth, supra*, 104 F. Supp. at 301.

asked to that inquiry. The indictment stated simply, in the words of the statute, that the defendant unlawfully refused to answer "questions which were pertinent to the question then under inquiry" (J.A. 3). This form of indictment has been upheld in other cases under the familiar principle that indictments in statutory language are ordinarily sufficient under Rule 7(c), F.R. Crim. P. *United States v. Josephson*, 165 F. 2d 82, 85 (C.A. 2), certiorari denied, 333 U.S. 838; *Barenblatt v. United States*, 240 F. 2d 875, 878 (C.A. D.C.), reversed on other grounds, 354 U.S. 830, and ultimately affirmed, 360 U.S. 109; *Sacher v. United States*, 252 F. 2d 828, 830-831 (C.A.D.C.), reversed on other grounds, 356 U.S. 576.*

Moreover, it is clear that petitioner was not compelled by the general allegation of the indictment to guess as to the subject under inquiry. He was given repeated and detailed explanations when he was questioned by the subcommittee in Washington (J.A. 172-173, 176, 178-180) that the subcommittee wanted to learn from him the extent and nature of Communist

* Contrary to petitioner's assertion (Pet. 17), the decision below is not in conflict with *United States v. Lamont*, 236 F. 2d 312 (C.A. 2). There, the indictments were held defective not because they failed to specify the subject matter under inquiry but because it was clear, as a result of judicial notice, that the inquiry was outside the scope of the committee's authorizing resolution and hence its jurisdiction. The court of appeals specifically stated that "The result might well be different were this a case of a committee created by Congress to hold hearings for a specific purpose, with the inquiry in question apparently falling within the assigned purpose" (*id.* at 316, note 6). The court then cited the *Josephson* case, which, like the instant case and unlike *Lamont*, involved the House Committee on Un-American Activities.

activity at Antioch College. The subcommittee further described at considerable length how the questions he refused to answer related to this subject. And if petitioner was left in any doubt, he could easily have moved for a bill of particulars.

3. Petitioner argues (Pet. 4, 19) that, when a witness refuses at the outset to answer any questions on the subject of Communism, he may not be punished for subsequently refusing to answer specific questions on that subject. Regardless of the legal validity of this claim, the instant case is not one in which there was a refusal to answer all questions even on a particular subject. Rather, petitioner repeatedly invoked the First Amendment in response to particular questions but did not state that he would refuse to answer future questions (see, e.g., J.A. 174, 177). In fact, petitioner answered questions concerning his acquaintances with prior witnesses as well as with Herbert Reed, who had been identified as a Communist Party organizer (J.A. 169-174). Thus petitioner's reliance (Pet. 19) on *United States v. Costello*, 198 F. 2d 200, 204 (C.A. 3), certiorari denied, 344 U.S. 874, is misplaced, for there the witness refused to answer any questions on a particular day and his contempt was total when he refused to testify at all.*

* It is also important to note that *Costello*, unlike the instant case, concerns a situation where the witness was charged in separate counts with refusing to answer any questions and also with refusal to answer particular questions. The court of appeals emphasized that the committee could not multiply the contempt by continuing to ask questions after the witness had stated his refusal to answer all questions. Where the witness makes a total refusal to answer as well as specific refusals to

4. Petitioner claims (Pet. 3-4, 19) that the subcommittee before which he refused to testify was not properly constituted and that this issue should have been decided, not by the judge, but by the jury. But this contention is not available since he made no objection to the constitution of the subcommittee at the time he was called before it. *United States v. Bryan*, 339 U.S. 323, 330-335; *Emspak v. United States*, *supra*, 203 F. 2d at 56, reversed on other grounds, 349 U.S. 180. If petitioner had made at that time any of the objections he subsequently raised at his trial, they could easily have been satisfied by the Committee. "To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." *United States v. Bryan*, *supra*, 339 U.S. at 333.

In any event, the trial court's action was correct. The court concluded that the issues whether the Committee chairman could appoint subcommittees, and whether such appointment could be made by telephone, were questions of law (J.A. 204, 223-224). As observed by the court of appeals (Pet. App. 2), these were legal questions within the trial court's prerogative. The court properly left to the jury the only questions of fact: whether the subcommittee was in fact so appointed and was acting during petitioner's appearance (J.A. 226). The jury decided pursuant to these instructions that the subcommittee was properly

answer particular questions, there seems no reason why he cannot be charged with contempt for at least one specific refusal to answer rather than with his total refusal.

constituted and this determination is amply supported by the evidence (see the Statement, *supra*, pp. 4-5)."

As for the legal issues, the trial court properly ruled that the Committee chairman had the power to appoint subcommittees by telephone. A House committee may adopt rules, may appoint subcommittees, and may confer on them powers delegated to the Committee. Deschler, *Rules and Manual, United States House of Representatives* (H. Doc. 456, 85th Cong., 2d Sess.) § 735; I Hinds' *Precedents of the House of Representatives* (1907) § 707; III *id.* at §§ 1841, 1842; VI Cannon's *Precedents of the House of Representatives* (1936) § 532; VIII *id.* at § 2214. The Committee on Un-American Activities on January 22, 1953, passed a resolution authorizing its chairman to appoint subcommittees from time to time to perform the functions of the Committee (J.A. 190). There is no authority or reason requiring that such appointment take any particular form or include any specific formalities. See *Meyers v. United States*, 171 F. 2d 800, 811, (C.A.D.C.), certiorari denied, 336 U.S. 912.

5. Petitioner also contends (Pet. 17-19) that the court committed several errors during the course of the trial. First, he argues that the question of pertinency, which was decided by the court as a matter of law (J.A. 195, 224-225), should have been decided by the jury. This Court, however, has made clear that pertinency is a matter of law for the trial court.

"Petitioner suggests (Pet. 12-13) that misleading evidence was introduced and that the trial judge did not exclude such evidence or give clarifying instructions. But petitioner did not object to this evidence at the trial (see, e.g., J.A. 168) and the only instructions on this issue which he requested were given (J.A. 32-33, 226-227).

Sinclair v. United States, 279 U.S. 263; see *Bowers v. United States*, 202 F. 2d 447; *Kenney v. United States*, 218 F. 2d 843.¹¹ And the determination of the court that the questions were pertinent—which is clearly shown by the subcommittee's own explanation of the questions to petitioner (J.A. 172-174, 176, 178-182)—is not open to reasonable doubt.

Petitioner next contends that the trial court applied a conclusive presumption that petitioner was subpoenaed to testify in aid of a legislative purpose although the evidence showed that the purpose was to punish him for contempt.¹² The court, however, applied no presumption, but found as a matter of law that the inquiry was for a legislative purpose and so charged the jury (J.A. 225). This decision is fully supported by the evidence introduced at the trial that petitioner was called before the subcommittee a second time because the Committee thought that petitioner might well cooperate with a legally constituted subcommittee (the subcommittee before which he first appeared was not legally constituted) and because the Committee believed that his testimony would be of great importance to its investigation of Communism

¹¹ While the holding of the court of appeals in *United States v. Orman*, 207 F. 2d 148, 155-156 (C.A. 3), on which petitioner relies (Pet. 17), is not altogether clear, it seems that the trial court left it to the jury to find the facts and instructed them that, if they found certain facts, the questions were pertinent as a matter of law. Certainly, the court did not purport to disregard the clear holding of this Court in the *Sinclair* case.

¹² Petitioner's argument goes to the method and correctness of the trial court's determination, not to whether the issue should have been decided by the court or the jury. The issue of legislative purpose has always been one for the court. See *Barenblatt v. United States*, *supra*, 360 U.S. at 127-133.

in the Dayton area (see the Statement, *supra*, p. 4). But even if the Committee believed that petitioner would continue to refuse to cooperate, it could properly call petitioner a second time in order to use its contempt power in an effort to compel him to answer. Cf. *Flazer v. United States*, 358 U.S. 147, 151.

Further, petitioner contends that the court should have charged the jury that as between equal inferences of guilt or innocence they should draw the inference of innocence. But the court gave a sufficient and proper charge on the presumption of innocence and on the requirement that the government prove all elements of the offense beyond a reasonable doubt (J.A. 218, 233-234). As was stated in *Becker v. United States*, 5 F. 2d 45, 51 (C.A. 2), on which petitioner relies (Pet. 19), "It is enough if it appears that the jury has been told that the prosecution must establish all the facts to the required degree of satisfaction of the jury, and there is no fixed way in which this need be communicated, so long as that idea is evident." The Second Circuit therefore upheld the conviction in the *Becker* case even though the charge requested by petitioner here (J.A. 37) was not given.

6. Finally, petitioner suggests (Pet. 19-20) that the Committee's charter, H. Res. 5, 83d Cong., 1st Sess. (Rule XI of the House Rules), in conjunction with 2 U.S.C. 192, is so vague as to violate due process. The subcommittee, however, clearly explained to petitioner the subject matter under inquiry and the pertinency of the questions to this subject (J.A. 172-174, 176, 178-182). Thus, petitioner cannot claim that he has been hurt by any alleged lack of clarity

in the authorizing resolution. Moreover, petitioner's contention was considered at length in *Barenblatt* and specifically rejected. 360 U.S. at 116-123. While petitioner asks (Pet. 20) reconsideration of *Barenblatt*, a similar plea was denied in *Davis v. United States*, certiorari denied, 361 U.S. 919 (see Pet. in No. 456, 1959 Term), and no additional reason is presented in this case."

"Petitioner states (Pet. 20) that several of the issues raised in his petition are now before the Court in *McPhaul v. United States*, No. 33, this Term, certiorari granted, 362 U.S. 917; *Wilkinson v. United States*, No. 37, this Term, certiorari granted, 362 U.S. 926; and *Braden v. United States*, No. 54, this Term, certiorari granted, 362 U.S. 960, and therefore suggests either that certiorari be granted in this case or at least that action on the petition be withheld until the decision of those cases. Although several of the issues are in fact common to this case and one or more of the three pending cases, we submit that the earlier cases do not provide any basis for asking this Court either to grant the writ or withhold action.

Four of the issues raised by petitioner—whether the indictment must specify the subject under inquiry and the pertinency of the questions, whether the question of pertinency should be decided by the jury, whether H. Rea. 5 is unconstitutionally vague, and whether this Court should overrule its decision in *Barenblatt*—are also involved in *Braden*. But while we cannot, of course, be certain of the reasons why the Court granted certiorari in that case, we believe that these issues are without substance, being controlled by clear judicial precedent, and are distinctly subsidiary to the more serious issues involved in *Braden*. In addition, petitioner's contention that pertinency is a jury question has a distant relationship to the claims in the three pending cases that, in fact, the questions in those cases were not pertinent to the subject under inquiry. It is obvious, however, that the issues are different, the former involving a general question of law, the latter dependent on the particular facts of each case. And while petitioner's suggestion that legislative purpose and pertinency were lacking is related to similar contentions in the three pending cases, these claims depend on their own facts and their own records.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1960.

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No. 8

JAMES R. BROWNING, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

NORTON ANTHONY RUSSELL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for
the District of Columbia Circuit

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

No. 8

NORTON ANTHONY RUSSELL, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals in affirming Petitioner's conviction is reported at 280 F(2) 688, and is set forth at R. 166-167. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals affirming Petitioner's conviction was entered June 18, 1960. R. 168. The Petition for a Writ of Certiorari was filed on July 15, 1960, and granted on June 19, 1961 (R. 169; 366 U.S. 960). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was tried by jury and convicted on an indictment for contempt of a Subcommittee of the House Committee on Un-American Activities at a hearing held in the District of Columbia in November 1954. In this context, the questions presented are:

1. Whether in a case concerning communism Petitioner is entitled to a dismissal of the indictment upon an uncontradicted showing that of the twenty-three members of the grand jury eleven were employees of the Federal Government and two were employees of the District of Columbia Government, and that such employees generally are in fact biased against a defendant because of the pressures generated by official loyalty-security programs; and if not so entitled, whether upon such showing Petitioner was at least entitled to a hearing to determine the extent of the actual bias in fact among such thirteen grand jurors against Petitioner.

2. Whether the indictment was required to state what subject was under inquiry and the relationship of the questions asked to that subject.

3. Whether Petitioner has been effectively deprived of his right to a trial by jury because:

(a) The trial judge applied a conclusive presumption that Petitioner's testimony was demanded in aid of a legislative purpose, although undisputed, objective evidence showed that Petitioner's testimony served no legislative purpose and was demanded only in order to punish him for contempt; and

(b) The trial judge personally decided the issue of the authority of the Committee Chairman to appoint

subcommittees adversely to Petitioner as a matter of law, although all the evidence on the issue was oral, and there were no documents to interpret; and

(c) The trial judge charged, in effect, that testimony of the appointment of a subcommittee with "X" as Chairman to sit in Dayton could be taken as proof of the appointment of a subcommittee with "Y" as Chairman to sit in Washington; and

(d) The trial judge refused direction of a verdict for lack of sufficient proof of the appointment of the Subcommittee of three which heard Petitioner, although there was no evidence at all as to the appointment of two of them, and the evidence of the appointment of the third of the three consisted solely of his own testimony which was self-contradictory on the point.

4. Where authority to a Committee Chairman to appoint subcommittees does not specify the method of appointment can the Chairman validly appoint a subcommittee by mere telephone call with no record made.

5. Does a witness commit contempt when at the outset of his second appearance he clearly refuses, as he had on his first appearance, to answer any questions on the subject of communism; and, if so, can he be validly tried and punished for each reiterated refusal to answer specific questions on the subject of communism which follow after his complete declinature.

6. Does the proof of pertinence at trial support the conviction of Petitioner.¹

¹ On this point which was not raised in the Petition for Certiorari Petitioner appeals to the power of the Court to pass on plain and prejudicial error apparent on the face of the record.

STATUTE INVOLVED

2 U.S.C. Sec. 192, R.S. 102 (52 Stat. 942), as amended, provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before . . . any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

The indictment here (R. 3) was for contempt of a Subcommittee of the House Committee on Un-American Activities at a hearing held in the District of Columbia in November 1954. It alleges in separate counts, with one question to each count, that Petitioner unlawfully refused to answer the questions set forth. Otherwise the indictment merely asserts the questions to have been "pertinent to the question then under inquiry."

The questions on which Petitioner was convicted were these:

1. Whether you did or whether you didn't join [the Communist Party] at that time, did he [Herbert Reed] encourage you to join? [Count Two]

2. I want to know whether Herbert Reed had anything to do with your getting into the Communist Party. [Count Three]

3. Did you have any knowledge of the existence of that group [an organized group of the Communist Party in Yellow Springs] in 1945 or 1946? [Count Four]

By motion to dismiss the indictment (R. 7), motion for hearing on qualifications of grand jurors (R. 5), motion for a directed verdict or in the alternative for a judgment of dismissal (R. 19), pertinent requests for jury charges (R. 21), all of which were refused or denied (R. 15, 139, 149), by statement of points on appeal to the Court of Appeals, and by Petition for Certiorari, all of the questions presented were, with one exception,² unquestionably raised and preserved.

Petitioner was indicted in December 1954 (R. 2), following more than seven years of official loyalty-security programs (R. 10). Of the twenty-three members of the grand jury which indicted Petitioner, eleven were employees of the Federal Government (including the Foreman who was employed by the Department of State) and two were employees of the District of Columbia (R. 5). In support of his motions for dismissal of the indictment for lack of an impartial grand jury, or for hearing on the qualifications of the grand jurors, Petitioner presented proof consisting of the uncontradicted affidavits of two experts in the field (R. 12-13), to the effect that such employees generally are in fact biased against a defendant in a case concerning communism because of the pressure generated by official loyalty-security programs. The experts, Dr. Maria Jahoda and Dr. Stuart W. Cook, Head of the Department of Psychology, Graduate School of Arts and Science, New York University, both social psy-

² See Fn. 1, p. 3.

chologists, had conducted a study on the impact of loyalty-security programs on Government employees in Washington, D. C. (R. 12-13). Petitioner offered, if hearing on grand juror qualifications were afforded, to show by the testimony of Drs. Jahoda and Cook, by the testimony of other named experts in the loyalty-security field, and by the testimony of the grand jurors concerned that such grand jurors were biased in voting in favor of Petitioner's indictment (R. 13-15). The opportunity was not afforded (R. 15).

At the trial, the evidence on a second issue was also not in dispute. The issue was whether Petitioner on the occasion of the alleged contempt was required to testify in aid of some legislative purpose or to commit contempt for which he would be punished. The evidence follows.

The alleged contempt was in Washington in November 1954. In September of 1954, Petitioner, a resident of the Dayton area, responded to a subpoena to appear in Dayton, Ohio, before a Subcommittee of the House Committee on Un-American Activities (R. 33, 61). Committee counsel called him then because he thought Petitioner would cooperate and testify "or [he] would not have called him, in all probability" (R. 68); and, when Petitioner did not cooperate, Committee counsel, to use his own words, "broke the questioning up and did not follow through on it" (R. 68).

At Dayton, Petitioner claimed a First Amendment privilege, against disclosure of his "opinions, political beliefs, and associations," and declined to answer the very first question asked of him which pertained to communism. That question was whether as an undergraduate at Antioch College Petitioner was aware of

a Young Communist League organization within the student body (R. 61-62). On the basis of the same First Amendment privilege, Petitioner declined to answer all questions concerning communism, and specifically questions concerning the circumstances under which he had met one Herbert Reed; whether Petitioner had paid dues to the Communist Party in Dayton before moving to Yellow Springs in 1948; whether Petitioner was in the Communist Party at any time prior to moving to Yellow Springs in 1948; and whether Petitioner is a member of the Communist Party (R. 61-63). After these declinations, Committee counsel announced: "I have no further questions" (R. 63); and Petitioner was completely excused (R. 63).

Although the Subcommittee at Dayton had started with all three members present on the day of Petitioner's appearance, there was only one member left and present by the time of Petitioner's appearance to hear his testimony (R. 61, 106). Committee counsel was aware of this lack of a legal quorum during Petitioner's appearance, and had it in mind when he broke off his questioning of Petitioner (R. 64, 107).

Committee counsel testified at the trial. At the close of Petitioner's appearance in Dayton, he had further questions and expected to get a Committee ruling as to recalling Petitioner (R. 63-64). So he testified; although at Dayton he announced having no further questions, and permitted Petitioner to be completely excused (R. 63). Committee counsel thought that Petitioner might not claim his First Amendment privilege if called to testify again, because when served with a new subpoena to appear in Washington in November Petitioner showed a desire to get in touch with a

Committee staff member (R. 64-65). However, the subpoena was not served until after the making of the decision to subpoena Petitioner for his appearance in Washington; and Petitioner's desire for a conference was to change the stated time for his appearance (R. 65).

At the time of Petitioner's appearance in Washington, the Chairman of the Committee group which heard him announced that the shortness of time allotted to the Dayton hearings had "resulted in the necessity of continuing that hearing by calling several witnesses for further testimony" (R. 67). However, three witnesses had testified at Dayton after Petitioner had testified; and one of them was a volunteer witness, unexpected and uninvited, who was permitted to testify at his own request after the hearings had already been closed (R. 67-68).

Two witnesses at Dayton, other than Petitioner, had declined to answer questions on a First Amendment claim of privilege. These declinatures were in the presence of a legal quorum. Neither witness was called to Washington for further testimony. Both were cited for contempt at Dayton and indicted there (R. 69-70). Petitioner was the only Dayton witness called for a further appearance at Washington; he was the only Dayton witness who claimed a First Amendment privilege in the absence of a legal quorum (R. 79).

At the Washington hearing, the Petitioner claimed precisely the same First Amendment privilege against forced disclosure of his "opinions and political beliefs and associations" (R. 66) as he had claimed at Dayton. And he made that claim at the very outset of the hearing in declining to answer the very first

question which concerned communism (R. 66). The taking of this stand by Petitioner in Washington admittedly ended any hopes that he "might cooperate with the Committee" and answer questions concerning communism (R. 113). Immediately upon Petitioner's general refusal at the outset to answer questions concerning communism, the Chairman, Mr. Clardy, sought and obtained a specific disclaimer from Petitioner of any reliance on the Fifth Amendment (R. 66); and, then, Committee counsel, in covering the same field of questioning as at Dayton, went on to ask the sixteen questions which provided the counts in the indictment (R. 3-4, 62-63, 67, 123-132). It was believed by the Committee and Committee counsel that at Washington they had a legally competent body to receive Petitioner's declinature (R. 65).

Upon the foregoing facts, Petitioner moved for a directed verdict on the ground that "the proof fails to show that in questioning defendant the Committee was pursuing a legislative purpose [but] rather, the proof shows that defendant was called to testify in order to punish him for contempt" (R. 20), and upon the further ground that "the proof shows that if defendant committed any crime of contempt, the crime was committed when, before any of the questions specified in the indictment, he made it clear that he was not going to answer any questions involving Communist Party membership or activities on his part" (R. 20). The motion was denied (R. 139). The specific requests of Petitioner for charges to the jury which would submit both issues were denied (R. 24-25). The Court informed the jury that as a matter of law the "inquiry was for a legislative purpose" (R. 156).

We turn to a summarization of the case on the two aspects (authority to appoint and action taken to appoint) of whether the three Congressmen, chaired by Mr. Clardy, before whom Petitioner appeared in Washington were legally appointed as a Subcommittee of the House Committee on Un-American Activities. The summary follows.

The Rules of the House of Representatives, applicable to the House Un-American Activities Committee, provide: "A Committee may adopt rules under which it will exercise its functions . . . and may appoint subcommittees" (R. 134). Committee counsel testified that there was no rule of the House on "who should be the one to appoint members of a subcommittee" (R. 104). The practice of the Committee was for the Chairman of the Committee to appoint subcommittees; and, in conformity with that practice, the Committee in January 1953 adopted a resolution authorizing the Chairman to appoint subcommittees (R. 135). So Committee counsel testified; but no resolution was offered. Neither the House nor the Committee has any rule with respect to the method by which the Chairman should appoint subcommittees (R. 134). The practice of the Chairman was to appoint subcommittees by personal interview or telephone (R. 116).

Petitioner urged to no avail that the question of the authority of the Committee Chairman to appoint subcommittees was one of fact, and that hence the foregoing evidence should be heard by the jury (R. 99, 103, 144). The Court excluded the jury (R. 91, 99, 103); refused a specific request for a charge submitting the issue of the Chairman's authority to appoint subcommittees for jury determination (R. 23); and in-

formed the jury as a matter of law that the Committee Chairman was authorized to appoint subcommittees, and could do so by telephone (R. 156).

The group before which Petitioner appeared in Washington had Mr. Clardy as Chairman, with Messrs. Scherer and Walter as ordinary members (R. 91, 120). All of the evidence on whether this Clardy group had been appointed as a subcommittee by the Chairman came from two Government witnesses, Messrs. Scherer and Tavener. In rejection of Petitioner's view that all of his testimony should be passed on by the jury (R. 31, 32-33), Mr. Tavener, Committee counsel, testified both in and out of the presence of the jury. He testified that at an executive Committee hearing in August 1954, the Chairman appointed a subcommittee of *Congressman Scherer as Chairman* with Messrs. Clardy and Walter as ordinary members to hold hearings at *Dayton* at any time prior to *three weeks before the election in the beginning of November* (R. 115, 119). This was out of the presence of the jury (R. 120). In the presence of the jury (R. 120), Government counsel emphasized "Clardy," "Scherer" and "Walter" as the names of the three man group before whom Petitioner appeared at Washington, and merely asked: "Are Congressmen Clardy, Scherer and Walter the same members of the Un-American Activities Committee which you state were appointed by Chairman Velde on August the 9th, 1954, at the time that the full committee authorized taking hearings?" To which Mr. Tavener simply answered: "They are, yes" (R. 120-121).

Mr. Scherer, a member of the group before which Petitioner appeared at Washington in November 1954,

testified on cross-examination that the Committee Chairman had telephoned him during the noon recess on the day of Petitioner's appearance "and said that he was appointing Mr. Clardy and Mr. Walter and myself, as the Chairman of the subcommittee, for the purpose of conducting the hearings that afternoon" (R. 87). On re-direct examination, Mr. Scherer, under the guidance of Government counsel, also testified that Mr. Clardy was to be Chairman of the subcommittee for the purpose of conducting the hearings that afternoon (R. 89).

Petitioner's motion for a directed verdict because of the lack of a sufficient showing of a properly constituted body (R. 19) was denied (R. 139). The trial judge in his own charge on this issue stated that the jury need only find that "the Chairman of the full committee had theretofore designated and appointed Representatives Clardy, Scherer and Walter as subcommittee for the purpose of conducting such hearings" (R. 157); and, further informed the jury that they could find such appointment either in the executive session of the Committee in August or by telephone on the day of Petitioner's appearance (R. 158). By this instruction to the jury, the trial judge permitted, indeed encouraged, the jury to find the appointment of the *Washington* subcommittee with *Clardy* as Chairman from Mr. Tavener's testimony of the August appointment of a subcommittee. But the jury was kept from hearing that the August appointment was of a *Dayton* subcommittee with *Scherer* as Chairman, and hence irrelevant to the appointment of the *Washington* subcommittee chaired by *Clardy*.

The indictment did not specify the subject under inquiry (R. 3). At the beginning of Petitioner's trial,

the Government stated its trial position to be that the subject under inquiry was as broad as the powers conferred upon the Committee by H. Res. 5 which established it; but that the Government could also offer proof of "special pertinency."³ Pursuant to the announced position of the Government as to the subject under inquiry, Committee Counsel testified that the "particular purpose of the Committee" as announced by the Chairman at the outset of the hearings in which Petitioner testified was "Communist Party activities in the labor movement in industry, in educational institutions," "the leadership in the United Electrical, Radio and Machine Workers of America in the Dayton area," and "particularly" the strike at the Univis Lens Corporation.⁴ According to Committee counsel, the foregoing "summarizes the purpose of the hearing" at which Petitioner's contempt is claimed (R. 34-35). But, on motion of the defense, Committee counsel's statement of the subject under inquiry was stricken so far as it did not conform to the Chairman's announcement at the outset of the hearings (R. 37).

The Government introduced the Chairman's announcement of the subject under inquiry. That an-

³ The Government's exact statement on the subject was (R. 43):

It is the position of the Government that this particular committee may call anyone available to it as a witness to inquire about matters that have to do with its resolution, that is, subversive activities, no matter who that person may be, because it has been held that personnel is part of the subject, and the numbers of persons that are engaged in that activity or that know about it would be possible sources of information. In spite of that position, that we do that, we also feel that we are entitled, nevertheless, to offer proof of special pertinency.

nouncement (R. 38-42), made at the beginning of the series of hearings in which Petitioner testified, went as follows: A summary of H. Res. 5; a reference to the cold war with Russia and Communist China being the cause of the Committee's investigation of the "Communist conspiracy"; the authorization by Congress of 160 billions for the nation's security; the observation that one "Communist agent" within our borders is more dangerous than 10,000 enemy troops; the observation that the Kremlin has taken 600 million people behind the iron curtain by "boring from within"; a recitation of Committee activities and communist objectives, and what "Mr. Average American" has learned as a result; a recitation of some subjects in which "the Committee as such has no interest" as, for example, "the labor movement"; the Committee's being "engaged . . . in throwing light upon the nefarious and subtle activities of those individuals who are promoting the Communist conspiracy so that . . . the average American may know them"; a denial of exaggeration of "the Communist danger"; the bad faith of witnesses who invoke the Fifth Amendment; and the pleasure of the Committee in the passage by Congress of an immunity law recommended by it. The Chairman did conclude with a statement that "for some time there has been a rather intense controversy in the Yellow Springs area" and that "complaints . . . from the Dayton-Yellow Springs area" resulted in the hearings about to start (R. 42). But neither the Chairman, nor anyone else, ever stated what the "rather intense controversy" was; and the defense's questioning directed to eliciting what "the complaints from the Dayton-Yellow Springs area" were about was prohibited on successful objection by the Government of "a fishing expedition" (R. 80).

In proof of "special pertinency," the Government introduced the testimony of two witnesses, Strunk and Wornstaff, who had preceded Petitioner at the hearings. Strunk, a member of the Communist Party in Dayton at the request of the Federal Bureau of Investigation, had testified (R. 43-50) that the main objective of the Communist Party in Dayton was infiltration in labor unions and building up strikes (R. 48). As to Petitioner, Strunk had stated that he was a member of the Communist Party in Dayton before moving to Yellow Springs at some time prior to 1950 (R. 48-49). As to Herbert Reed (a name involved in two of the three counts on which Petitioner was convicted), Strunk merely identified him as a Communist Party officer who had already left Dayton when Strunk became a member of the Communist Party in 1944 (R. 46, 49). Wornstaff, President in 1948 of Local 678, U.E.-C.I.O., had testified (R. 50-56) to aspects, Communist and otherwise, of the Univis Lens Corporation strike in which his Local was engaged in 1948. His only reference to Petitioner was to state that Petitioner is not a member of Local 678 (R. 54). There is no mention of Herbert Reed in Wornstaff's testimony.

In further proof of subject under inquiry and pertinence, the Government introduced portions of the Committee's Annual Report for 1954 (R. 57). The Annual Report (R. 57-60) sets forth the legislative status of recommendations made by the Committee on: capital punishment for peace time espionage; immunity for certain witnesses; admissibility of wiretapping evidence; elimination of Communist Party control over certain labor unions; withdrawal of military commissions from persons claiming the Fifth Amendment; outlawing of the Communist Party; and requiring

Government contractors to supply affidavits of non-membership in the Communist Party. With reference to the Dayton hearings, the Annual Report specifically stated that those hearings were a continuation of "the committee's investigation of Communist infiltration in basic industries throughout the United States" (R. 58). Nevertheless, the Report goes on to state that (R. 58-59): "During your committee's hearings in Dayton, Ohio, several witnesses connected with various institutions of higher learning in the United States were subpoenaed." Those witnesses included a Mr. Metcalf who admitted his participation in a Communist group at Antioch College in 1945 but refused to name his associates (R. 59).

Finally, as to subject under inquiry and pertinence, Committee Counsel testified that of the matters entrusted to the full Committee no particular subject was singled out for the Dayton hearings (R. 115).

Such is the whole of the Government's proof at trial so far as it was offered for the purpose of showing subject under inquiry and pertinence. The trial judge refused to direct a verdict (R. 139). "He ruled twice that the questions on which Petitioner was convicted were "pertinent to the subject under inquiry" (R. 132, 138), and so instructed the jury (R. 156), without indication of what he believed the subject under inquiry to be. The Court of Appeals in affirming Petitioner's conviction had only this to say on the point (R. 167): "The judge determined here that the questions were pertinent, and we find no ground on which to disagree."

The sentence on each of Counts Two, Three, and Four was thirty days' imprisonment and a fine of Five Hundred Dollars, "said sentences . . . to run concurrently" (R. 29).

SUMMARY OF ARGUMENT**I.**

It was Petitioner's right to be put to trial only upon indictment by the Grand Jury. Grand Jurors, no less than Petit Jurors, are required to be impartial and to have the appearance of impartiality. Thirteen of the 23 man grand jury here were government employees. The indictment against Petitioner was returned in December 1954, when the latest of more than seven continuous years of official loyalty-security programs for government employees was still current. By that time, as our uncontroverted proof at trial showed, government employees in general were so intimidated by the fear of personal security consequences as to be incapable of passing unbiased judgment on charges involving communism. The presence of a majority of such government employees on the grand jury here seriously prejudiced Petitioner; for the grand jury had to adjudicate the existence or absence of probable cause on at least two difficult issues—a pertinent subject of inquiry, amid a welter of conflicting possibilities; and a legislative purpose in the demand for Petitioner's testimony. This is just such a case as the opinions of the Court in *Frazier*, *Dennis*, and *Morford* envisaged. Petitioner's motion to dismiss the indictment for lack of an unbiased grand jury should have been granted.

At a minimum, Petitioner was unquestionably entitled to the alternative he requested in May 1956, of a hearing to determine the existence of actual bias in the thirteen government employees who sat on the grand jury. Because of the change in the Washington loyalty-security climate since 1956, we respectfully suggest that the proper remedy today for failure to accord

Petitioner such a hearing in 1956 is the dismissal of the indictment.

II.

The indictment merely used the words of the statute in charging that the questions which Petitioner refused to answer "were pertinent to the question then under inquiry." The failure to specify "the question then under inquiry" vitiates the indictment. The controlling precedents in this Court requiring that result are particularly applicable here. Usually difficult of certain ascertainment in any case, the question under inquiry was surely not known to Petitioner at the time of indictment—entirely apart from any presumption of innocence. The grand jury, in failing to specify the question under inquiry, left a blank which the prosecutor, trial judge, or Court of Appeals, could fill in differently, and for all we know did. To permit that is to abrogate the well-settled rule against amendment of indictments, and to abdicate this Court's power of review in this type of contempt case. Unless the indictment specifies the question under inquiry, the Court cannot discern whether the grand jury found probable cause as to the elements of a punishable offense, or whether, if the Grand Jury did, the Petitioner was convicted of that offense. Yet the fairness required by due process does not allow a conviction to stand where, as here, it remains most likely that an essential element of the offense, i.e. the question under inquiry, meant one thing to the Grand Jury and something very different to the trial judge or reviewing Court. That the questions asked of Petitioner invaded his normal First Amendment rights is all the more reason for the Court to insist upon the grand jury's statement of the question under inquiry.

Finally, if, in this connection, Petitioner's rights under the First, Fifth, and Sixth Amendments are to be balanced against the Government's need to continue with indictments specifying no question under inquiry, the scales must incline heavily on Petitioner's side. The lack of specification has seriously and continuously prejudiced Petitioner's defense in the trial court, the Court of Appeals, and here. On the Government's side of the balance there is so little. A question under inquiry is difficult to ascertain, which is only the more reason for making sure by its specification that a proper and correct one has been ascertained. But once ascertained, a question under inquiry is easily stated in a few words. Until recent years, contempt indictments did state the question under inquiry. There was no good reason for the indictment not to state it here.

III.

Just before Petitioner was asked the questions on which he was indicted, he declined to answer any such questions on precisely the same grounds as he had used in declining to answer substantially the same questions on an earlier appearance. At that point, as Committee Counsel conceded at the trial, there was no hope of Petitioner's answering the indictment questions. All of the pertinent circumstances further reinforce the conclusion of fact that answers to the indictment questions were demanded of Petitioner for the invalid purpose of punishing him for contempt and not to get information in aid of a legislative purpose. The decisions do not preclude adjudication of the issue of punishment or legislative aid. Rather, the decisions require consideration and decision on it. As Petitioner requested, a verdict should have been directed, or, at least, the issue should have been submitted to the jury.

IV.

Under this heading, we summarize four separate but connected reversible errors made at trial in connection with determination of the legality of the Washington group which heard Petitioner.

Admittedly, the Congressional group before whom the alleged contempts were committed were appointed as a Subcommittee by the Chairman of the full Committee, or they were not appointed at all. The Chairman's authority so to appoint was a contested issue at the trial. The evidence on the issue, all oral, was in conflict. Credibility was important. The issue was a factual one. Determination of it rested essentially on whether, in the face of testimony that only the full Committee could appoint subcommittees, a Government witness was to be believed in his assertion that the Committee had adopted a resolution (never produced) authorizing the Chairman to appoint subcommittees. Nevertheless, the trial judge decided the issue as a matter of law, and adversely to Petitioner. This deprivation of Petitioner's right to a jury trial was a prejudicial error.

On the facts here, the authority, if any, conferred upon the Chairman to appoint subcommittees failed to specify the method of appointment, and the Washington group which heard Petitioner were appointed as a Subcommittee by telephone, if appointed at all. In these circumstances, the trial judge charged the jury that appointment of the subcommittee by telephone would be legal. This Court should hold that Committee authority to its Chairman to appoint subcommittees without specification of method is limited to a method more formal and definitive than a mere telephone call without any record made. No less is appropriate when

compulsion upon pain of jailing for contempt is used in a First Amendment area.

The Washington group which heard Petitioner had Mr. Clardy as Chairman and Messrs. Walter and Scherer as members. The whole of the Government's proof on the appointment of that group consisted of: (1) a statement by Mr. Scherer of his appointment to a subcommittee of which Mr. Clardy was to be Chairman; (2) a contradictory statement by the same Mr. Scherer that his appointment was to a subcommittee of which he was to be Chairman; and (3) no evidence at all of the appointment of Messrs. Clardy and Walter. In refusing a directed verdict, the trial court erroneously permitted the jury to engage in speculation on the appointment of the Washington group that heard Petitioner.

The trial court plainly committed a fourth reversible error in instructing the jury that the appointment of the Washington group with Mr. Clardy as Chairman could be derived from the appointment of a subcommittee with Mr. Scherer as Chairman to hold hearings in Dayton.

V.

The contempt, if any, committed by Petitioner was complete when he refused to answer any questions concerning communism. Thereafter, the subcommittee could not multiply the contempt, and the punishment, by asking the indictment's individual questions concerning communism and repeatedly eliciting the same refusal. *Yates v. United States*, 355 U.S. 66, and other authorities cited.

True, the contempt, completed on Petitioner's refusal to answer any questions concerning communism,

continued through each individual question on which he thereafter declined. *Yates v. United States, supra*. Petitioner, however, had a right to be tried only upon the indictment of the grand jury. The indictment did not charge Petitioner with one continuing contempt, but alleged sixteen separate contempts which under *Yates* were not punishable. Petitioner has never been afforded the opportunity of meeting a charge of one continuing contempt. His conviction of multiple, individual contempts cannot, consistently with Due Process, be now sustained on the basis of one continuing contempt that was never charged.

VI.

The Government was required to prove a subject under inquiry. *Deutch v. United States*, 367 U.S. 456. For a subject under inquiry the Government relied on H. Res. 5, the resolution which established the Committee. But H. Res. 5 cannot validly serve as the subject under inquiry. *Watkins v. United States*, 354 U.S. 178. At trial, the Government touched on a number of possible subjects of inquiry. But none of these was connected to the indictment questions, or relied on in this Court by the Government. Instead, the Government now claims a subject under inquiry which was not offered as such at trial. In these circumstances, the trial court rather plainly found pertinence on the invalid basis of H. Res. 5 as the subject under inquiry. In any event, no other subject was proven beyond a reasonable doubt. A verdict should have been directed as requested by Petitioner.

ARGUMENT

I. The Conviction Was Invalid Because Petitioner Was Deprived of His Rights to Impartial Grand Jurors.

1. *Petitioner's right to impartial grand jurors.*—It was Petitioner's right to be put to trial only upon indictment by the Grand Jury. 2 U.S.C. Sec. 194; Constitution, Art. V. The indictment of Petitioner, like any indictment, was "no more than an accusation." See p. 126 of Brief for the United States in *Gold v. United States*, 352 U.S. 985, No. 137, Oct. Term 1956; *United States v. Remington*, 191 F(2) 246, 252 (C.C.A. 2, 1951); *United States v. Knowles*, 147 F. Supp. 19, 21 (D.C.D.C., 1957). But it does not follow that the composition of the Grand Jury matters not. This Court rejects the contention that who is on a grand jury is immaterial. *Cassell v. Texas*, 339 U.S. 282; *Pierre v. Louisiana*, 306 U.S. 354. The Grand Jury is not an adjunct of the prosecutor's office.⁴ Established in Anglo-Saxon institutions since Magna Charta, the Grand Jury has continuously served through the centuries to protect the citizen against being put to trial upon prejudiced and unfounded accusations.⁵ The

⁴ *Stirone v. United States*, 361 U.S. 212, 217; *Ex Parte Bain*, 121 U.S. 1; *In re National Window Glass Workers*, 287 Fed. 219 (N.D. Ohio, 1922); *Stanley v. State*, 171 Tenn. 406, 416, 104 S.W. (2) 819, 822 (1937); *Ex Parte Peart*, 5 Cal. App. (2) 469, 473, 43 Pac. (2) 334, 336 (1935).

⁵ *Ex Parte Bain*, 121 U.S. 1, 11; *Beavers v. Henkel*, 194 U.S. 73, 84; *Hale v. Henkel*, 201 U.S. 43, 61-62; *United States v. Johnson*, 319 U.S. 503, 513; *Application of United Electrical, Radio, and M Workers*, 111 F. Supp. 858, 866 (S.D.N.Y., 1953); *Maley v. District Court of Woodbury County*, 221 Iowa 732, 734, 266 N.W. 815, 817 (1936).

Grand Jury is no less than a judicial body,⁶ which as a "part of the judicial process"⁷ for "the determination of guilt or innocence"⁸ is charged with conducting a "judicial inquiry"⁹ to judge conclusively whether probable cause exists for the trial of a citizen in a criminal case.¹⁰ Since the function of adjudication of probable cause performed by the Grand Jury "forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matter of first importance." See opinion of Mr. Justice Frankfurter for the Court in *United States v. Johnson*, 319 U.S. 503, at 507. Because of considerations such as these, "this Court over the past fifty years has adhered to the view that valid grand jury selection is a constitutionally protected right." See opinion of Mr. Justice Clark for the Court

⁶ *Toth v. Quarles*, 350 U.S. 11, 16; *Cobbledick v. United States*, 309 U.S. 323, 327; *Wilson v. United States*, 221 U.S. 361, 377; *United States v. Neff*, 212 F(2) 297 (C.C.A. 3, 1954); *Naftzger v. United States*, 200 Fed. 494, 497 (C.C.A. 8, 1912); *In re National Window Glass Workers*, 287 Fed. 219 (N.D. Ohio, 1922); *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 446, 61 So. 345, 348 (1913); *State v. Burney*, 229 Mo. App. 759, 767, 84 S.W. (2) 659, 664 (1935); *Ex Parte Peart*, 5 Cal. App. (2) 469, 473; 43 Pac. (2) 334, 336 (1935).

⁷ See *Cobbledick v. United States*, 309 U.S. 323, 327.

⁸ See *Toth v. Quarles*, 350 U.S. 11, 16.

⁹ *Cobbledick v. United States*, 309 U.S. 323, 327; *Wilson v. United States*, 221 U.S. 361, 377; *Hale v. Henkel*, 201 U.S. 43, 66; *Beavers v. Henkel*, 194 U.S. 73, 84; *United States v. Neff*, 212 F(2) 297, 301 (C.C.A. 3, 1954).

¹⁰ *Ex Parte United States*, 287 U.S. 241, 250; *Blair v. United States*, 250 U.S. 273, 282; *Hendricks v. United States*, 223 U.S. 178, 184; *Beavers v. Henkel*, 194 U.S. 73, 84; *Ex Parte Bain*, 121 U.S. 1, 12.

in *Reece v. Georgia*, 350 U.S. 85, 87. A Grand Juror has always been subject to disqualification in the Federal Courts,¹¹ and in State Courts, too.¹²

And the Grand Juror, no less than his twin, the Petit Juror, to whom he is generally assimilated,¹³ is required

¹¹ *Crowley v. United States*, 194 U.S. 461; *United States v. Hammond*, 26 Fed. Cas. 99 (C.C.D. La., 1875); Rule 6(b) of the Federal Rules of Criminal Procedure; see *United States v. Gale*, 109 U.S. 65, 69-70; *Keizo v. Henry*, 211 U.S. 146, 149; and 48 Stat. 649.

¹² *State v. Barkley*, 198 N.C. 349, 151 S.E. 733 (1930); *State v. Rector*, 158 S.C. 212, 155 S.E. 385 (1930); *State v. Soileau*, 173 La. 531, 138 So. 92 (1931); see *Gibbs & Stanton v. State*, 45 N.J.L. 379, 382, aff'd. 46 N.J.L. 353 (1884); *State v. Anderson*, 166 Atl. 662, 664 (Gen. Sess., Del., 1933).

¹³ The Grand Juror decides probable cause with respect to the same issues on which the Petit Juror decides guilt. The federal statutes provide but one set of statutory qualifications (28 U.S.C. Secs. 1861 ff.), and one method of selection from a common list (28 U.S.C. Sec. 1864; D. C. Code, Title 11, Secs. 1401 ff.) for Grand Juror and Petit Juror alike. A majority of the States do the same. See Wayne L. Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 231. "Statutes covering jurors," without specification of whether grand or petit, are held to apply to grand jurors as well as petit jurors. *Clawson v. United States*, 114 U.S. 477; *Williams v. United States*, 275 Fed. 129 (C.C.A. 9, 1921); *Spencer v. United States*, 169 Fed. 562 (C.C.A. 8, 1909). "Principles which forbid discrimination in the selection of petit juries also govern the selection of grand juries." See *Pierre v. Louisiana*, 306 U.S. 354, 362. Early in our history, Chief Justice Marshall equated grand jurors to petit jurors on the matter of grounds for challenge. 1 *Burr's Trial*, 38. And not long ago, it was stated that "in a particular case Government employees serving as Grand or Petit Jurors might be barred for implied bias when circumstances are properly brought to the Court's attention which convince the Court that Government employees would not be suitable jurors." See *United States v. Emspak*, 95 F. Supp. 1010, 1012 (D.C.D.C., 1951), aff'd. 203 F. (2) 54 (C.C.A.D.C., 1952), rev'd. on other grounds, 349 U.S. 190.

to be impartial. The Grand Juror is so pledged. See the opinion of Mr. Justice Black for the Court in *Costello v. United States*, 350 U.S. 359, 362; Wayne L. Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 116-118 (1931). This Court has noted the "right to a fair and impartial grand jury" (*Cassell v. Texas*, 339 U.S. 282, 298), and in specifying the requirements of a valid indictment insists upon a "nonbiased grand jury" (*Lawn v. United States*, 355 U.S. 339, 349) or "unbiased grand jury" (*Costello v. United States*, 350 U.S. 359, 363). The decisions invalidating convictions on indictments by grand juries from which negroes,¹⁴ or women,¹⁵ have been excluded are surely based upon "assuring a diffused impartiality." See *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (opinion of Mr. Justice Frankfurter dissenting but not on this point); *Cassell v. Texas*, 339 U.S. 282, 287; and *Strauder v. West Virginia*, 100 U.S. 303, 309. In the federal courts, at least, there has never been any substantial doubt that grand jurors are required to be impartial. See *Strauder v. West Virginia*, 100 U.S. 303, 309 (Reason given for reversal of conviction where Negroes were excluded from grand jury was that "prejudices often exist against particular classes in the community, which sway the judgment of jurors."); *Ex Parte Bain*, 121 U.S. 1, 11 (The indictment itself is designed to pro-

¹⁴ *Cassell v. Texas*, 339 U.S. 282; *Pierre v. Louisiana*, 306 U.S. 354; *Carter v. Texas*, 177 U.S. 442; *Strauder v. West Virginia*, 100 U.S. 303.

¹⁵ *Ballard v. United States*, 329 U.S. 187; *United States v. Roemig*, 52 F. Supp. 857 (N.D. Iowa, 1943); and cf. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (exclusion of daily wage earners from petit jury).

teet against "unfounded accusations . . . prompted by partisan passion."); *Costello v. United States*, 350 U.S. 359, 364 (Mr. Justice Burton in a concurring opinion states: "I assume that the Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment."); *Clawson v. United States*, 114 U.S. 477 (Statute providing for exclusion in a bigamy case of all "jurors" believing in bigamy held to apply to grand jurors because grand jurors holding such a belief would be as biased as petit jurors of the same belief); *United States v. Nunan*, 236 F(2) 576, 593 (C.C.A. 2, 1956), cert. den. 353 U.S. 912 (Refusal of grand jurors to be intimidated by "legislative sound and fury" commended); *United States v. Remington*, 191 F(2) 246, 252 (C.C.A. 2, 1951) (Biased grand jury foreman might exercise undue influence requiring quashing of indictment); *United States v. Stein*, 140 F. Supp. 761, 767 (S.D.N.Y., 1956) (Indictment to be valid must be returned by unbiased grand jury); *United States v. Emspak*, 95 F. Supp. 1010, 1012 (D.C.D.C., 1951), aff'd. 203 F(2) 54 (C.C.A. D.C., 1952), rev'd. on other grounds 349 U.S. 190 (Grand Jurors can be barred for implied bias); *United States v. Wells*, 163 Fed. 313, 329 (D.C. Idaho, 1908) ("Unbiased equipoise" is a "principal feature" of the grand jury); *United States v. Jones*, 69 Fed. 973, 975 (D.C. Nev., 1895) (Grand Juror can be barred for bias); *United States v. Jones*, 31 Fed. 725, 727 (C.C.S.D. Ga., 1887) (One biased grand juror vitiated the indictment); *United States v. Benson*, 31 Fed. 896, 900 (C.C.D. Calif., 1887) (Mr. Justice Field states that Federal Courts are not re-

stricted to state disqualifications of grand jurors but can always bar grand jurors biased by intimidation.¹⁶

In some respects, the achievement of justice in the administration of the criminal law requires impartiality more of the Grand Juror than the Petit Juror. The Grand Juror is more likely to succumb to prejudice, fear, or partiality. Unlike the Petit Juror, he works directly with the prosecutor, and does not have the immediate presence and assistance of an impartial judge and counsel for both sides. Partiality stands out less in his large group of 23. The Petit Juror knows that his own vote is required for conviction. With that individual responsibility, the Petit Juror may succeed in surmounting his fears. Contrariwise, the Grand Juror knows that indictment can be had without his own vote, and that a petit jury will pass upon the case in its turn. In these circumstances, it is all too easy for the frightened Grand Juror to see no compelling reason for "sticking his neck out" by vote

¹⁶ A number of cases in the state courts are in accord. Indictments are invalidated because of the participation of but one biased grand juror. *The State of Iowa v. Gillick*, 7 Iowa 287 (1858); *People v. Wintermute*, 1 Dak. 63, 46 N.W. 694 (1875); *People v. Landis*, 139 Cal. 426, 73 Pac. 153 (1903); *People v. Bright*, 157 Cal. 663, 109 Pac. 33 (1910); see *Patrick v. State*, 16 Nebr. 330, 20 N.W. 121 (1884); *Commonwealth v. Craig*, 19 Pa. Super. 81 (1902); *State v. Richardson*, 149 S.C. 121, 123, 146 S.E. 676, 677, (1928); *People v. Coken*, 357 Ill. 198, 200, 191 N.E. 276, 277 (1934); *In Re Grand Jurors Ass'n., Bronx County, N.Y., Inc.*, 25 N.Y. Supp. (2) 154 (Sp. T. Bronx Co., 1941). In view of the authorities cited in the text and in this footnote, the statement in *United States v. Knowles*, 147 F. Supp. 19, 21 (D.C.D.C., 1957), rev'd. on other grounds, 280 F(2) 696 (C.C.A.D.C., 1960) that the basic theory of a grand jury does not require impartiality can only be regarded as a sport.

and argument against an indictment which he personally knows to be unwarranted.

Petitioner was plainly entitled to impartial grand jurors. And further, in order to avoid injury to the jury system by an unseemly use of grand jurors lacking the appearance of impartiality, the grand jurors who indicted petitioner were required to have the appearance of impartiality as well as the substance. See *Ballard v. United States*, 329 U.S. 187, 195; *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225; *Frazier v. United States*, 335 U.S. 497, 515-516 (Opinion of Mr. Justice Jackson, dissenting); *Dennis v. United States*, 339 U.S. 162, 181-182 (Opinion of Mr. Justice Frankfurter, dissenting); cf. *Tumey v. Ohio*, 273 U.S. 510, 532.

2. *The grand jury Petitioner got.*—The indictment here was returned in December 1954 (R. 2). More than seven years of official loyalty-security programs for government employees immediately preceded the indictment (R. 10), and the latest security program was still current (R. 10). The programs received wide publicity in the press, and by the time the grand jury met to adjudicate probable cause for trial in petitioner's case every government employee must have been keenly aware of the existence and operation of such programs (R. 10), including the fact that official investigation was made of "any government employee against whom an accusation is made, however slight, of any indication of sympathy for a communist" (R. 10). The grand jury here knew that petitioner was believed to be a Communist; for his Congressional testimony shows that, and the very questions on which he was indicted all dealt with petitioner's alleged Communist activities (R. 3-4; 9).

In the period 1951-1952, two social psychologists had conducted a study of the impact on government employees in Washington, D. C., of less than six years of loyalty-security programs (R. 12-13). One of these experts, Dr. Marie Jahoda, found that (R. 12):

... Under present conditions there is a great likelihood that many federal employees are not in a position of passing fearless and unbiased judgment on matters in any way concerning loyalty, security or charges of communism. It is my opinion also that many government employees will at present be reluctant to disagree with official accusations that a person was a communist or associated with communists for fear that if they disagreed, they themselves would become suspect and subject to investigation. I am further of the opinion that the fear which was so evident in our interviews is the result not of a bad conscience, but of the present climate of opinion among federal employees which engenders suspicion and fear, regardless of innocence or guilt.

The other expert who collaborated in the study, Dr. Stuart W. Cook, Head of the Department of Psychology, Graduate School of Arts and Science, New York University, found that (R. 13):

... under present conditions in Washington, D. C., such employees are not sufficiently free from the fear of personal consequences to pass unbiased judgment on charges involving loyalty, security or communism. Such employees, I believe, are unable to free themselves of the possibility that if they disagree with official accusations that a person is a communist or is associated with communists, this will become a part of their own records and eventually play a role in an investigation of their own loyalty and security.

The foregoing findings were proven by the affidavits of the experts concerned (R. 9-13). The Government passed up cross-examination; and offered no evidence in contravention (R. 15).

Of the twenty-three members of the grand jury which indicted petitioner, thirteen were government employees, including the Foreman who was an employee of the Department of State and two employees of the District of Columbia (R. 5-6).

Nevertheless, the District Court refused to dismiss the indictment (R. 15); and the Court of Appeals affirmed petitioner's conviction (R. 167).

3. *The precise contention we make here.*—We accept the decisions in *Frazier v. United States*, 335 U.S. 497, and *United States v. Wood*, 299 U.S. 119. We do not urge that the government employee is to be barred from jury participation in criminal cases in the District of Columbia regardless of the nature or circumstances of his employment and their relation to the matters involved in a particular prosecution. Yet, in evaluating the seriousness for petitioner and jury system alike of the contention we do make, the Court should recall that such barring of the Government employee was once held essential for impartiality and the appearance of impartiality in all criminal prosecutions in the District of Columbia. See *Crawford v. United States*, 212 U.S. 183.

We accept the majority decision in *Dennis v. United States*, 339 U.S. 162. Accordingly we do not urge that *three months* of having an official loyalty order with "administrative implementation . . . yet to come," as was the case in *Dennis* (339 U.S. at p. 169), would so affect government employees in the District of Colum-

bia as to prejudice the fact or the appearance of their impartiality as jurors in criminal cases. The facts in petitioner's case are far more grave. Yet, in connection with *Dennis*, too, we would respectfully ask the Court to observe that the meager facts in *Dennis* were believed by two dissenting Justices to suffice for the barring of Government employees as jurors. See *Dennis v. United States*, 339 U.S. 162 at 175 ff. and 181 ff. (Dissenting opinions of Mr. Justice Black and Mr. Justice Frankfurter).

We are not concerned here with grand juries that sit at any place other than Washington, D. C., or that consider cases not involving alleged communists. Neither are we concerned with any Washington, D. C., grand jury that sat in 1947 (as in *Dennis*) or that sits now or in the future. The grand jury which indicted petitioner, an alleged Communist, sat at Washington, D. C., in 1954 (R. 2). As to that grand jury, we urge on the facts we have shown (pp. 29-31, *supra*), that the intimidating impact of seven years of operation of loyalty-security programs on government employees as a class was more than sufficient to bar the thirteen government employees from participation in its deliberations.

Over eighty years ago, the Court in *Strader v. West Virginia*, 100 U.S. 303, 309, stated:

It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and, which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.

Uncontradicted on the record here is the fact of prejudice in the Washington community of government em-

ployees against the hated class of communists which, allegedly, included petitioner.

The Court in *Frazier* carefully left the government employee ineligible for jury participation when a showing of "actual bias" is made. And the Court carefully defined "actual bias" to include "not only prejudice in the subjective sense but also such as might be thought implicitly to arise in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise." See *Frazier v. United States*, 335 U.S. 497, 510n. In *Dennis*, the majority opinion noted that no decision was being made against a showing of prejudice and fear from a loyalty order in bar of the government employee as a juror in a communist case; and Mr. Justice Reid who concurred did so on his understanding of the majority opinion to hold that government employees are to be barred "for implied bias when circumstances are properly brought to the Court's attention which convince the Court that Government employees would not be suitable jurors in a particular case." See *Dennis v. United States*, 339 U.S. 162, 168, 171-172, 172-173. The Court in *Morford v. United States*, 339 U.S. 258, reversed a conviction in a communist case for failure to allow a *voir dire* of government employees on the subject of the influence on government employees of the Truman loyalty order.¹⁷

Petitioner's case is just such a case as *Frazier* and *Dennis* envisaged. The uncontroverted showing we

¹⁷ That *Frazier*, *Dennis*, and *Morford* were concerned with petit jurors rather than grand jurors is immaterial on a question of impartiality. See paragraph 1, *supra*, pp. 23-29.

have already made of "fear" among government employees "regardless of innocence or guilt" in a communist case (R. 12) is the showing for which opportunity was afforded by reversal of the conviction in *Morford*—except that our proof by at least two impartial experts who conducted a study of government employees is more seemly and rational than direct questioning of jurors.¹⁸

The Court invalidates convictions where jurors acted under colorful conditions of intimidation because of hostile public sentiment and mob violence. *Moore v. Dempsey*, 261 U.S. 86; see *Frank v. Mangum*, 237 U.S. 309, 335. Here the exposure of government employees to seven years of loyalty-security programs was more depressing than colorful, and more subtly baneful than violent. Cf. *Irvin v. Dowd*, 366 U.S. 717. We have proven the inevitable intimidation which resulted. Had we not made that proof, we might well have asked the Court, whose members live in the Washington metropolitan area, to take notice of intimidation that was certainly notorious by 1954. As early as 1948, Mr. Justice Jackson, a veteran in government employment, already had a prophetic insight into such intimidation:

At the same time that it [the Government] made its plea to them [government-employee jurors] to convict, it had the upper hand of every one of them in matters such as pay and promotion. Of late years, the Government is using its power as never before to pry into their lives and thoughts upon

¹⁸ See *Dennis v. United States*, 339 U.S. 162, 182-183 (Dissenting opinion of Mr. Justice Frankfurter); *United States v. Remington*, 191 F(2) 246, 252 (C.C.A. 2, 1951); *People v. Landis*, 139 Cal. 426, 73 Pac. 153 (1903).

the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to "... crook the pregnant hinges of the knee where thrift may follow fawning."² (*Frazier v. United States*, 335 U.S. 497, 515)

With the passage of but two years, two Justices of this Court found such intimidation of government employees already so notorious as to warrant judicial notice:

... Only naivete could be unmindful of the force of the considerations set forth by Mr. Justice Black, and known of all men. There is a pervasiveness of atmosphere in Washington whereby forces are released in relation to jurors who may be deemed supporters of an accused under a cloud of disloyalty that are emotionally different from those which come into play in relation to jurors dealing with offenses which in their implications do not

touch the security of the nation. Considering the situation in which men of power and influence find themselves through such alleged associations, it is asking more of human nature in ordinary government employees than history warrants to ask them to exercise that "uncommon portion of fortitude" which the Founders of this nation thought judges could exercise only if given a life tenure. (*Dennis v. United States*, 339 U.S. 162, 175, 182)

And see *Quinn v. United States*, 203 F(2) 20, 26 (C.C.A.D.C., 1952), rev'd 349 U.S. 155 (Opinion by Judge Bazelon, dissenting for himself and Judge Edgerton).

If an increasingly oppressive and intimidating atmosphere was so notorious by 1950 as to warrant judicial notice by Justices of the Court, then surely our proof of the fact of intimidation in 1954 is ample. In *Remmer v. United States*, 347 U.S. 227, 229, the Court laid down the requirement that "a juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder." Cf. *In re Grand Jurors Ass'n, Bronx County, N. Y., Inc.*, 25 N.Y. Supp. (2) 154 (Sp. T. Bronx Co. 1941). Here our proof (R. 9-13) shows the government employee to have been borne down by the whole weight of a suspicious Congress, a frightened Executive Branch, an oppressive and pervasive fear, and consequent worry as to family and family support—the very things that move men most.

"Diffused impartiality" befits a grand jury. Petitioner got a concentration of partiality, and certainly the appearance of it. The conviction of petitioner denies due process of law; for the procedure followed in this case offered every government employee on the

grand jury "a possible temptation . . . to forget the burden of proof required . . . or . . . not to hold the balance nice, clear and true between the State and the accused . . ." See *Tumey v. Ohio*, 273 U.S. 510, 532.

The judicial functions which the Grand Jury had here to perform were not *pro forma*. The Grand Jury had to adjudicate the existence or absence of probable cause on two issues—a pertinent subject of inquiry, amid a welter of conflicting possibilities; and a legislative purpose in the demand for petitioner's testimony. Those issues remain difficult of fair solution even at this late stage of the case. See Points III and VI, pp. 51 and 64, *infra*. A third issue before the Grand Jury was whether petitioner's answers to the questions declined were demanded despite his objections (see *Quinn v. United States*, 349 U.S. 155). At trial, the District Court directed a verdict on most of the Counts for lack of such demand (R. 153). But the grand jury's erroneous finding of such demand left the issue in the case to burden the preparation of petitioner's defense. A grand jury less subject to intimidation might have insisted upon specification in the indictment of the subject of inquiry for which it found probable cause, and saved petitioner the bewilderment on this point which plagued his defense throughout trial. See Point II, *infra*, p. 41. So, although we need make no showing of prejudice,¹⁹ petitioner suffered serious prejudice by the violation of his right to impartial grand jurors.

¹⁹ *Cassell v. Texas*, 339 U.S. 282; *Ballard v. United States*, 329 U.S. 187, 195; *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225; *Ex Parte Bain*, 121 U.S. 1, 9; *United States v. Roemig*, 52 F. Supp. 857, 862 (N.D. Iowa, 1943); *United States v. Edgerton*, 80 Fed. 374 (D.C. Mont., 1897).

4. *The Remedy for Violation of Petitioner's right to impartial grand jurors.*—A biased grand juror does more than just vote. He participates in the give and take of grand jury deliberations. In any deliberative group where all but one are impartial, the one who is secretly biased has a tremendous advantage in getting his fellows to reach the result which he is determined to achieve regardless of every consideration. His fellows but weigh while the biased one drives toward a predetermined goal. So it is that a considerable body of authority supports invalidation of an indictment because of one biased grand juror.²⁰ And the law is so solicitous of avoiding any possibility of undue influence on the grand jury that the presence of any unauthorized person invalidates an indictment.²¹ Had there been but one government employee on the grand jury here, it would have been a nice question whether the indictment should be invalidated on that account, or whether the conviction should be reversed for ascertainment of how many jurors, *not* government em-

²⁰ *United States v. Gale*, 109 U.S. 65, 69-70; *United States v. Jones*, 31 Fed. 725, 727 (C.C.S.D. Ga., 1887); and see the State Court cases cited, *supra*, p. 28 n. 16.

²¹ *Lathan v. United States*, 226 Fed. 420 (C.C.A. 5, 1915); *United States v. Wells*, 163 Fed. 313 (D.C. Idaho, 1908); *United States v. Edgerton*, 80 Fed. 374 (D.C. Mont., 1897); *Coblentz v. State*, 164 Md. 558, 166 Atl. 45 (1933); *People v. Munson*, 319 Ill. 596, 150 N.E. 280 (1926); *Collier v. State*, 104 Miss. 602, 61 So. 689 (1913); *Maley v. District Court of Woodbury County*, 221 Iowa 732, 266 N.W. 815 (1936) (by statute); *Nixon v. State*, 68 Ala. 535 (1881) (by statute).

ployees, necessarily concurred in the indictment.²² However, there was a majority of 13 government em-

²² Rule 6(b)(2) of the Federal Rules of Criminal Procedure, in providing for a motion to dismiss an indictment based "on the lack of legal qualifications of an individual juror" goes on to require that an indictment shall not be dismissed if "12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." If we had but one government employee on the grand jury here, it would be an open question whether this provision as to the concurrence of 12 "legally qualified" jurors applies to a case of bias as distinguished from the lack of legal qualifications provided by statute, i.e., citizenship, age, residence, non-conviction for serious crime, literacy and mental and physical competence. See 28 U.S.C. Sec. 1861.

The Rule 6(b)(2) provision on the concurrence of 12 legally qualified jurors derives from Section 2 of Public Law 180, Act of April 30, 1934, Ch. 170, 48 Stat. 649. The draftsmen of Rule 6(b)(2) apparently intended no change. See 18 U.S.C. (1946 ed.), Sec. 554(a). But the legislative reports on Public Law 180 supply no light on the problem of applicability to a case of bias. See H. Rept. 707, and S. Rept. 585 on H.R. 7748, 73rd Cong., 2nd Sess. There was no debate in the Senate. And the debate of a few minutes in the House looks in both directions; but darkly. 78 Cong. Rec. 2777-2778. A few dicta merely assume applicability of Rule 6(b)(2) to a bias case. See *United States v. Thompson*, 144 F(2) 604, 606 (C.C.A. 2, 1944); *Castle v. United States*, 238 F(2) 131, 136 (C.C.A. 8, 1956); *United States v. Fujimoto*, 102 F. Supp. 890, 896 (D.C. Hawaii, 1952); *United States v. Adams*, 3 F.R.D. 396, 405-406 (S.D.N.Y., 1944). However, the opinions in *United States v. Knowles*, 147 F. Supp. 19, 20 (D.C.D.C., 1957) and *United States v. Remington*, 191 F(2) 246, 252 (C.C.A. 2, 1951) proceed on the assumed premise of non-applicability of Rule 6(b)(2) to a case of bias. Finally, if the proper interpretation of Rule 6(b)(2) were involved here, the cases cited in footnotes 6 and 20, *supra*, would indicate strongly that Congress in passing Public Law 180 to alleviate invalidation of indictments for technical defects did not mean in such ambiguous fashion to change the law as to deprivation of fundamental rights to impartial grand jurors who are free of the possibility of undue influence.

ployees²³ on the grand jury which indicted Petitioner. The District Court, accordingly, should have dismissed the indictment. Petitioner's conviction should be reversed now for that purpose. We think that plain enough in the light of the Court's decisions and the history of a judicial process that ever seeks fairness, particularly in the criminal law.

Yet, if we be wrong on this, Petitioner was unquestionably entitled in May of 1956 to the minimum alternative he requested of a hearing to determine the existence of actual bias in the thirteen grand jurors who were government employees. *Morford v. United States*, 339 U.S. 258; *United States v. Foster*, 83 F. Supp. 197 (S.D.N.Y., 1949); see *United States v. Emspak*, 95 F. Supp. 1010, 1012 (D.C.D.C., 1951). Reversal in order to require such a hearing in 1961, or 1962, would not remedy the deprivation of Petitioner's right to a hearing in 1956. Happily for the government employee the Washington of 1961 is not the Washington of 1956; for in the years since 1956 there

²³ Perhaps it is unnecessary to state that on the issue here presented no rational distinction can be drawn between the eleven government employees who worked for the federal government and the two government employees who worked for the District of Columbia. All were subject to the Federal Congress, and to appointees of the President. The District of Columbia Government and the Federal Government both employ on the basis of Standard Form 57, "Application for Federal Employment," which includes questions relating to considerations of loyalty and security. The Veterans Preference Act applies alike to employees in each government. Six departments of the District government are by statute directly under the Civil Service Commission. Thus, the personnel policies and forms of the Federal and District governments are practically identical; and identical are their impact upon the employees of the two governments, except that District employees in 1954 were not formally assured of the meager protection of federal loyalty-security orders.

has been increasing freedom from oppression. To extract the evidences of fear from a grand juror who is then in fear is difficult enough. To extract such admissions years after he was frightened would hardly be possible. Shame inhibits self-discovery. The friendly presence of the prosecutor lends welcome support to the suppression of hateful memories of shabby grand jury action. When the battle is over, all men were brave. It is a commonplace that totalitarian regimes have been in power for decades and have vanished without leaving many who can admit supporting them. For these reasons, we respectfully suggest that the remedy today for failure to accord a hearing in 1956 must, in fairness, be dismissal of the indictment. So the Court may find it unnecessary to decide whether Petitioner in 1956 was entitled to dismissal of the indictment because of implied bias or to a hearing for determination of actual bias.

II. The Conviction Should Be Reversed Because the Subject Under Inquiry and the Pertinence of the Questions Thereto Were Not Particularized in the Indictment.

The indictment merely used the words of the statute in charging that the questions which Petitioner refused to answer "were pertinent to the question then under inquiry." (R. 2) Our contention is that the indictment's use of such generic language without further particularization of those elements of the charged crime violated petitioner's rights under the Fifth and Sixth Amendments, and under Rule 7(c) of the Federal Rules of Criminal Procedure.²⁴

²⁴ The same contention was presented as a question in Petition for Certiorari in *Braden v. United States*, Oct. Term, 1960, No. 54, 365 U.S. 431. However, Petitioner in that case did not brief the point, and it was not decided.

To avoid confusion between the questions which Petitioner declined to answer and the "question under inquiry" we use the

When, as is the case with Section 192, a statute defines an offense in generic terms, "it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars." See *United States v. Cruikshank*, 92 U.S. 542, 558; *United States v. Simmons*, 96 U.S. 360, 362; *United States v. Hess*, 124 U.S. 483, 487; and *Keck v. United States*, 172 U.S. 434, 437. In these cases, extensively cited and followed in the federal courts,²² the Court voided indictments for the very reason that an element of the offense was charged in statutory generic terms without specification of particulars—as is the case here. Such generalization in the charging of an element of the offense was held to violate the right of an accused, conferred upon him by the Sixth Amendment, to "be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense." See *United States v. Simmons*, 96 U.S. 360, 362; *Burton v.*

term "subject under inquiry," instead of "question under inquiry."

If, as we urge, the indictment was void for failure to specify the subject under inquiry, there is no need to consider whether the indictment would have to state some connective reasoning between the questions and the undisclosed subject of inquiry to show pertinence. Conversely, if the subject of inquiry need not be specified in the indictment, it follows that the pertinence of the questions need not be particularized and, indeed, cannot be. For these reasons, we simplify the argument made in the text by confining it to the lack in the indictment of a specified subject of inquiry.

²² *United States v. Goldberg*, 225 F(2) 180, 184 (C.C.A. 8, 1955); *White v. United States*, 67 F(2) 71, 73 (C.C.A. 10, 1933); *United States v. Geare*, 293 Fed. 997, 1000 (App. D.C., 1923); *Brenner v. United States*, 287 Fed. 636 (C.C.A. 2, 1922); *Knauer v. United States*, 237 Fed. 8, 13 (C.C.A. 8, 1916); *Martin v. United States*, 168 Fed. 198, 205 (C.C.A. 8, 1909); *United States v. Bop*, 230 Fed. 723, 726 (N.D. Cal., 1916).

United States, 202 U.S. 344, 372; *Bartell v. United States*, 227 U.S. 427, 431; *Hagner v. United States*, 285 U.S. 427, 431.²⁶

The *Simmons*, *Hess* and *Keck* indictments were held void by this Court, and many indictments are held void in the lower federal courts,²⁷ for failure to descend from generic statutory terms to *particulars that would lie within the knowledge of a guilty accused*. Nevertheless, in those cases the presumption of innocence secured the constitutional right to indictment particulars of guilty and innocent alike. See *Lynch v. United*

²⁶ In the lower federal courts, the purpose of this Constitutional right of an accused to particularity in an indictment is variously, but strongly stated. The indictment must so clearly inform the accused of the crime charged "that he may prepare all defenses within his power to offer," *Burnett v. United States*, 222 F(2) 426, 428 (C.C.A. 6, 1955); that he "not be taken by surprise by the evidence offered at the trial," *Wolpa v. United States*, 86 F(2) 35, 38 (C.C.A. 8, 1936), cert. den. 299 U.S. 611; and that he be told "all he needs to know for his defense," *Davis v. United States*, 49 F(2) 267 (C.C.A. 4, 1931), cert. den. 283 U.S. 859; *Blum v. United States*, 46 F(2) 850, 851 (C.C.A. 6, 1931); *Martin v. United States*, 299 Fed. 287, 288 (C.C.A. 4, 1924).

²⁷ *United States v. Strauss*, 285 F(2) 953 (C.C.A. 5, 1960); *White v. United States*, 67 F(2) 71 (C.C.A. 10, 1933); *Reimer-Gross Co. v. United States*, 20 F(2) 36 (C.C.A. 6, 1927); *Turk v. United States*, 20 F(2) 129 (C.C.A. 8, 1927); *Jarl v. United States*, 19 F(2) 891 (C.C.A. 8, 1927); *Boykin v. United States*, 11 F(2) 484 (C.C.A. 5, 1926); *Hartson v. United States*, 14 F(2) 561 (C.C.A. 2, 1926); *Lynch v. United States*, 10 F(2) 947 (C.C.A. 8, 1925); *Carpenter v. United States*, 1 F(2) 314 (C.C.A. 8, 1924); *Fontana v. United States*, 262 Fed. 283 (C.C.A. 8, 1919); *Martin v. United States*, 168 Fed. 198 (C.C.A. 8, 1909); *United States v. Fuselier*, 46 F(2) 568 (W.D. La., 1930); *United States v. Burns*, 54 Fed. 351 (C.C.D. W. Vir., 1893); *United States v. Goggin*, 1 Fed. 49 (C.C.D. Wisc., 1880); cf. *Patterson v. United States*, 222 Fed. 599, cert. den. 238 U.S. 635; *United States v. Bop*, 230 Fed. 723 (N.D. Cal., 1916).

States, 10 F(2) 947, 949 (C.C.A. 8, 1925); and *Fontana v. United States*, 262 Fed. 283, 286 (C.C.A. 8, 1919).

But the "subject of inquiry" is an elusive thing. The very term, itself, has its semantic difficulties. Cf. the discussion, *infra* at p. 64. The subject of inquiry in cases like this one is not susceptible of ascertainment from the House Resolution which empowered the House Committee on Unamerican Activities. *Watkins v. United States*, 354 U.S. 178, 209-211. It cannot properly be derived from sources not known to the accused at the time he testified. *Watkins*, at pp. 214-215, 217. It may or may not be susceptible of ascertainment from a number of different sources. *Watkins* at pp. 209-214; *Barrenblatt v. United States*, 360 U.S. 109 at pp. 124-125. Given the same sources, Courts disagree on what it is in a particular case. Compare the opinions of the Court below in *Watkins v. United States*, 233 F(2) 681, and *Sacher v. United States*, 252 F(2) 828, with the opinions of this Court in the same cases, 354 U.S. 178, and 356 U.S. 576. And members of the same Court, given the same materials, can and do disagree on the subject of inquiry. Compare the majority and dissenting opinions in *Deutsch v. United States*, 367 U.S. 456, 472, 475. Usually difficult of certain ascertainment in any case, the fact of the subject of inquiry was surely not in petitioner's possession at the time of indictment—entirely apart from any presumption of innocence. We must assume that the Grand Jury had a subject in mind to which it thought the indictment questions to be probably relevant. Had it been revealed in the indictment, petitioner could have prepared his defenses to the subject of inquiry claimed. Instead, he was left to grope at trial among

the many different possible subjects on which the prosecution offered proofs;²⁸ and some of those could not possibly have been imagined by him in advance of trial. See pp. 12-16, *supra*. Here, then, there was extraordinary reason for requiring specification in the indictment of the subject of inquiry; for, unlike most cases in which the Sixth Amendment has been applied to invalidate indictments couched in general, statutory terms, petitioner, himself, had no knowledge of the subject of inquiry, whether or not he was presumed to be innocent. Indeed, in this case, it remains an assumption to this day that anyone rightly knew or knows the subject under inquiry when petitioner testified. The Chairman of the Subcommittee before which petitioner appeared meandered extensively (R. 38-42); but not more so than the Subcommittee's counsel (R. 35) or the prosecutor at trial (R. 43ff). The Grand Jury (R. 2), the District Court (R. 132; 138; 156), and the Court of Appeals (R. 166-167) all failed to specify any subject under inquiry. And yet, a subject under inquiry, although it is hard to come by, is stated easily and in a few words, once it is ascertained. See, e.g. *Barrenblatt v. United States*, 360 U.S. 109 (ascertained subject of inquiry: Communist infiltration into education); (*Wilkinson v. United States*, 365 U.S. 399 (ascertained subject of inquiry: Communist infiltration into basic Southern industry)).

The failure of the indictment to specify the subject under inquiry could not be remedied by a bill of par-

²⁸ Cf. *Johnson v. United States*, 294 Fed. 758 (C.C.A. 9, 1924); and *United States v. Burns*, 54 Fed. 351 (C.C.D. W. Vir., 1893).

ticulars.²⁰ *White v. United States*, 67 F(2) 71 (C.C.A. 10, 1933); *Jarl v. United States*, 19 F(2) 891 (C.C.A. 8, 1927); *Naftzger v. United States*, 200 Fed. 494 (C.C.A. 8, 1912); cf. *Lanzetta v. New Jersey*, 306 U.S. 451, 453. If he was to be charged at all, it was petitioners's right to be indicted by the Grand Jury. 2 U.S.C. Sec. 194; Constitution, Art. V. Neither the prosecutor, nor any of the Courts passing on this case could amend the indictment. That is well settled.²⁰

Hence, if the Grand Jury had specified "A" as the subject of inquiry, neither "B" nor "C" nor "D" etc. could validly serve as the subject of inquiry at any stage of petitioner's case. But here where the Grand Jury has made no specification of the subject of inquiry, it is true, for aught that the Court can discern, that the Grand Jury indicted on the basis of subject of inquiry "A," the trial judge convicted on subject of inquiry "B," and the Court of Appeals affirmed on subject of inquiry "C." This is a forbidden process of amendment of the indictment, far worse than any condemned by the controlling decisions with respect to amendments of indictments on which we rely. Here,

²⁰ If, in fact, the prosecutor here knew for what subject of inquiry the Grand Jury found probable cause, then there is all the more reason for requiring its specification in the indictment. The fair administration of criminal justice seeks justice. The Government should not want a conviction obtained by concealment which deprives the accused of a full and fair opportunity to prepare his defense. See *White v. United States*, 67 F(2) 71, 77 (C.C.A. 10, 1933); *United States v. Burns*, 54 Fed. 351, 359 (C.C.D. W. Vir., 1893).

²⁰ *Stirone v. United States*, 361 U.S. 212; *United States v. Norris*, 281 U.S. 619; *Ex Parte Bain*, 121 U.S. 1; *Dodge v. United States*, 258 Fed. 300 (C.C.A. 2, 1919), cert. den. 250 U.S. 660; *Stewart v. United States*, 12 F(2) 524 (C.C.A. 9, 1926); *Naftzger v. United States*, 200 Fed. 494 (C.C.A. 8, 1922).

as to an essential element of the crime charged, the Grand Jury left a blank which anyone—prosecutor, trial judge, or reviewing Court—could fill in differently at will, and for all we know, did. Petitioner's conviction must be reversed, or the well-settled rule against amendments to indictments is made meaningless. More fundamentally, the fairness required by the Due Process Clause surely invalidates the procedures by which petitioner still stands convicted; for here, unless his conviction is set aside, it will always remain likely that Petitioner was, in effect, charged by the Grand Jury with one crime, convicted by the trial judge of another, and found guilty on review of still a third. *Cf. Kottekos v. United States*, 328 U.S. 750; *Cole v. Arkansas*, 333 U.S. 196; *United States v. Klass*, 166 F(2) 373 (C.C.A. 3, 1958); *Jarl v. United States*, 19 F(2) 891, 892 (C.C.A. 8, 1927); *Johnson v. United States*, 294 Fed. 753 (C.C.A. 9, 1924).

However, it remains most likely that petitioner was indicted for no crime at all. The indictment and trial in this case were before this Court's decision in *Watkins*. In the pre-*Watkins* days, the Government was erroneously asserting the subject of inquiry to be as broad as the House Resolution which empowered the House Committee on Un-American Activities. Such was the position of the Government at trial in this case. See R. 43; see also *United States v. Lorch*, Cr. No. 3185 (S.D. Ohio, Nov. 27, 1957, unreported); and *cf. Shelton v. United States*, No. 9, United States Supreme Court October Term, 1961, R. 17-18; 20; 40; *Knowles v. United States*, 230 F(2) 696, 700 (C.C.D.C., 1960); and *United States v. Peck*, 154 F. Supp. 603, 610-11, fn. 25 (D.C.D.C., 1957). The Grand Jury's position can be reasonably assumed to have been the same. So,

in all likelihood, petitioner was put upon his trial upon Grand Jury findings as to probable cause that constituted no offense, since, under this Court's decision in *Watkins*, the House Resolution which empowered the Committee cannot serve as a subject of inquiry.

Because the indictment specified no subject of inquiry, we have been compelled in this discussion to speak of the probability rather than the fact of indictment for no crime, or indictment and conviction for different crimes. And the Court here is under the same compulsion. In plain and simple terms the Court must reverse Petitioner's conviction; or, in this type of contempt of Congress case where the indictment specifies no subject of inquiry, the Court must abdicate its traditional and paramount function of review in enforcement of Constitutional limitations. Unless the indictment specifies the subject under inquiry, the Court cannot discern whether the Grand Jury found probable cause as to the elements of a punishable offense, or whether, if the Grand Jury did, the petitioner was convicted of that offense. In such circumstances, and they are the very circumstances here, review becomes impossible or constitutes the mere rubber stamping of a conviction, which is the same thing. Cf. *Watkins v. United States*, 354 U.S. 178, 214; *Sweezy v. New Hampshire*, 354 U.S. 234, 254.

Furthermore, since the questions Petitioner refused to answer were to some extent an invasion of a personal area normally protected by the First Amendment (*Barrenblatt v. United States*, 360 U.S. 109, 126), the strict according of Petitioner's Fifth and Sixth Amendment rights with respect to the indictment, and a strict demand for precise procedures that enable this Court's purposeful review, are particularly appro-

priate. The several provisions of the Bill of Rights were not intended to wither away separately in isolation but to reinforce each other in their various and overlapping applications. At least, such is the jurisprudence of which we Americans have been taught, largely by this Court, to be proud.

Finally, if Petitioner's rights under the First, Fifth, and Sixth Amendments are to be balanced against the Government's need to continue with indictments which specify no subject of inquiry, the scales must incline heavily on Petitioner's side. There is so little to put on the Government's side. A subject of inquiry is difficult to ascertain. But that is no excuse for the Grand Jury's failure to state one. Rather, since it is difficult to ascertain, it is only the statement of it which can insure that probable cause was found for this element of pertinence. Once the subject of inquiry is ascertained, there is no burden involved in stating it. Only a few words are needed. See p. 45, *supra*; and see *United States v. Lorch*, Cr. No. 3185 (S.D. Ohio, Nov. 27, 1957, unreported). The *Lorch* case arose from the same series of hearings as this one; but the indictment there simply stated in a few words that the subject under inquiry was "Communist Activities in the Dayton-Yellow Springs area." Indeed, in contempt of Congress cases it was once traditional for the indictment to state the subject under inquiry and the relation of the indictment questions to it, even though such statement was much more complicated than the few words required here. See *Sinclair v. United States*, 279 U.S. 263, 285-289; *In re Chapman*, 166 U.S. 661, 663; cf. *Kilbourn v. Thompson*, 103 U.S. 168, 170ff.

The Government, it is authoritatively stated, must "plead" pertinence. See *Sinclair v. United States*, 279 U.S. 263, 296-297; *Bowers v. United States*, 202 F(2) 447, 453 (C.C.A.D.C., 1953). In the light of the considerations we have set forth, the pleading of pertinence must require more than a general statement that the questions were "pertinent to a question then under inquiry" (J.A. 3). See *United States v. Lamont*, 236 F(2) 312 (C.C.A. 2, 1956); *United States v. Metcalf*, Cr. No. 3052 (S.D. Ohio, Oct. 3, 1955, unreported). Otherwise, the requirement that pertinence must be pleaded would insure only that the Assistant United States Attorney accredited to the Grand Jury has read the statute and quoted it accurately in the indictment. Surely, the Court in *Sinclair* was not concerning itself with requiring that formal ritual. Required pleading in any indictment, and especially where rights under the First, Fifth, and Sixth Amendments are involved, is directed, as we have shown, to assuring: Trial upon the Grand Jury's finding of probable cause for the elements of the crime, and no one else's; a fair opportunity to the accused to know the charge and so prepare his defense; conviction upon a crime charged by the Grand Jury and not some other crime or no crime at all; and preservation of the Appellate Court's opportunity to review. Because the indictment failed to specify a subject under inquiry, none of these is assured here. Petitioner's conviction should be set aside and the indictment dismissed.

III. The Conviction Should Be Reversed Because Petitioner's Testimony Was Demanded to Punish Him for Contempt and Not in Aid of a Legislative Purpose. At a Minimum, Petitioner was Wrongfully Deprived of a Jury Trial on This Issue.

We respectfully ask the Court to reread our Statement at pp. 6-9 for the details (none of them is unimportant) of the evidence at trial pertinent to the largely factual contentions we make here.

Petitioner first testified at Dayton in September, 1954. He was called then only on the theory that he would "cooperate," i.e. answer all questions; for otherwise "in all probability" he would not have been called at all (R. 68). Petitioner's flat refusal on the basis of the First Amendment to answer any questions concerning communism was thoroughly tested at Dayton by a series of specific questions that elicited no change in Petitioner's refusal. Satisfied that Petitioner would not cooperate, Committee Counsel "broke the questioning up" (R. 68) and Petitioner was excused with the announcement that Committee Counsel had no further questions (R. 63). In Petitioner's appearance at Dayton nothing occurred to warrant any hope that if called again in a few weeks and asked the very same questions he would answer them. He was not in any doubt as to the rightness of his position,²¹ and had not been misled by any misinformation (cf. *Raley v. Ohio*, 360 U.S. 423) or ambiguous order (cf. *Flaxer v. United States*, 358 U.S. 147) from the Committee. And, in

²¹ Petitioner's refusal was explicitly based on the claim of a First Amendment right. Later, *Barrenblatt*, *Wilkinson*, and *Braden* rejected such a claim. But those cases, this case, and the companion contempt cases now before the Court are all evidences of a widespread belief in such a claim, sincerely and staunchly held by many people at the time of Petitioner's appearances.

the face of the Government's burden of proof in a criminal trial, it cannot be assumed from the fact of no quorum at Dayton that Petitioner (1) knew that a quorum is required; (2) knew what constitutes a quorum; (3) knew that the one member sitting had not been appointed to sit alone, and hence might not be a quorum; and (4) that his refusal to answer was therefore influenced by the absence of a quorum.

At Washington where Petitioner's alleged contempt occurred, the Chairman announced that shortness of time at Dayton had "resulted in the necessity of continuing that hearing by calling several witnesses for further testimony" (R. 67). That false excuse fails to hide the absence of any purpose other than punitive in the Committee's recall of Petitioner; for (1) three witnesses testified at Dayton after Petitioner had testified, including an unscheduled witness permitted to testify on his own request; (2) the other witnesses at Dayton who had relied on the First Amendment were not called to Washington in the hope of answers previously declined, but were indicted for contempt in Dayton where their appearances had, unlike Petitioner's, been before legal quorums; and (3) Petitioner who was the only Dayton witness to rely on the First Amendment in the absence of a legal quorum was the only Dayton witness called for a further appearance at Washington. (p. 8, *supra*)

Nothing occurred in the weeks between September and November to warrant any hope that Petitioner at Washington would answer the questions he had flatly refused to answer at Dayton. But again, the Government's effort at trial to rebut this fact fails to hide the absence of any purpose other than punitive in the Committee's recall of Petitioner. Committee Counsel

testified at the trial. He thought that Petitioner might not claim his First Amendment privilege if called to testify again, because when served with a new subpoena to appear in Washington in November, Petitioner showed a desire to get in touch with a Committee staff member. However, the subpoena was not served until after the making of the decision to subpoena Petitioner for his appearance in Washington; and Petitioner's desire for a conference was to change the stated time for his appearance (p. 8, *supra*).

At the Washington hearing, the Petitioner claimed precisely the same First Amendment privilege against forced disclosure of his "opinions and political beliefs and associations" (R. 66) as he had claimed at Dayton. And he made that claim at the very outset of the hearing in declining to answer the very first question which concerned communism. The reiteration of his position by Petitioner in Washington admittedly ended any remotely possible hope that he "might cooperate with the Committee" and answer questions concerning communism (R. 113). Immediately upon Petitioner's reiterated general refusal at the outset to answer questions concerning communism, the Chairman sought and obtained a specific disclaimer from Petitioner of any reliance on the Fifth Amendment; and, then, Committee counsel, in covering the same field of questioning as at Dayton, went on to ask the sixteen questions which provided the counts in the indictment. It was believed by the Committee and Committee counsel that at Washington they had a legally competent body to receive Petitioner's declination (pp. 8-9, *supra*).

In the circumstances here presented, the fact that Petitioner was called to Washington for the purpose

of punishing him for contempt and not for a legislative purpose can scarcely be doubted. We do not understand that the trial judge disagreed with the fact. Rather he "felt" that consideration of the issue "was pretty well precluded by some of the decisions" (R. 139). On that theory the trial judge denied our motions for a directed verdict and for judgment of dismissal made at the close of the Government's case and at the close of all of the evidence, and refused to submit the issue to the jury (R. 139, 149, 24-25). The Court of Appeals affirmed (R. 167).

The pertinent decisions do not preclude consideration of the issue of legislative purpose or purpose to punish; rather they require consideration and determination of that issue. The power of the Congressional group which heard Petitioner could extend only to obtaining information in aid of legislation. It had no power to call petitioner to punish him for contempt. *McGrain v. Daugherty*, 273 U.S. 135, 178; *Sinclair v. United States*, 279 U.S. 263, 295; *Quinn v. United States*, 349 U.S. 155, 161; *Watkins v. United States*, 354 U.S. 178, 187. In *Sinclair*, the Court expressed doubt as to whether any presumption of regularity attaches that a Congressional Committee is asking questions pertinent to an authorized subject; and the Court stated that the presumption of innocence in a contempt of Congress trial would be stronger. *Sinclair v. United States*, *supra*, at p. 296. In any event, so far as there may be a presumption favoring the Government it is plainly a rebuttable one; for in its decisions which deal with a charge of questions for punishment and not in aid of legislation, the Court has carefully reviewed the record before passing on the charge. See *McGrain v. Daugherty*, *supra*, at pp. 179-180; *Sinclair v. United States*, *supra*, at p. 295; *Wilkinson v. United*

States, 365 U.S. 399, 411, 429; *Brown v. United States*, 245 F(2) 549 (C.C.A. 8, 1957); see also, *United States v. Icardi*, 140 F. Supp. 383 (D.C.D.C., 1956); and *United States v. Cross*, 170 F. Supp. 303 (D.C.D.C., 1959).

Here there was no more than "the mere semblance of legislative purpose" (*Watkins*, at p. 198) in compelling the responses by Petitioner for which he was indicted. The semblance of a legislative purpose cannot justify the questions asked of Petitioner. *Watkins v. United States*, 354 U.S. 178, 198; *United States v. Rumely*, 345 U.S. 41. We readily admit that a Committee may secure a quorum to encourage the getting of information by threatened sanctions of contempt and perjury prosecution. And we do not seek to impugn the motivation of Committee members. But the affirmance of Petitioner's conviction requires the existence of a legislative purpose in demanding answers to the questions for which he was indicted. Here, we have shown by objective and uncontradicted evidence that those questions were asked of Petitioner, not with the legislative purpose of getting answers, but with the forbidden purpose of again getting refusals for punishment by contempt. A directed verdict on the issue was warranted. See *Brown v. United States*, *United States v. Icardi*, and *United States v. Cross*, all *supra*; and cf. *Wilkinson v. United States*, 365 U.S. 399, 429 (Dissenting opinion by Mr. Justice Brennan for himself and Mr. Justice Douglas). At a minimum, Petitioner was entitled to a submission to the jury of an issue of fact as to punishment or legislative aid.

IV. The Trial Court. Affirmed by the Court of Appeals. Committed Four Separate Reversible Errors in the Handling of the Question of the Proof of a Legally Constituted Body in That (1) the Issue of the Committee Chairman's Authority to Appoint Subcommittees Was Withheld From the Jury; (2) the Jury Was Informed That the Chairman Had Authority to Appoint Subcommittees By Telephone Alone; (3) a Directed Verdict for Lack of Sufficient Proof of the Appointment of a Subcommittee to Hear Appellant Was Denied; and (4) the Jury Was, in Effect, Instructed That Evidence of the Appointment of a Subcommittee with Mr. Scherer as Chairman Would Suffice as Proof of the Appointment of a Subcommittee With Mr. Clardy as Chairman.

(1) The Government's theory at the trial was that the Chairman of the Committee had appointed as a subcommittee the group which heard Petitioner. The Chairman's authority so to appoint was therefore squarely in issue. All of the evidence on the issue was oral. No documents were introduced. There was testimony that subcommittees could be appointed only by the Committee, itself (R. 134). There was also testimony that in practice the Chairman appointed committees by telephone or personal interview (R. 116), and that he had been authorized to do so by a Committee resolution (never produced) which did not specify the method of appointment to be used (R. 135). The trial judge refused to submit to the jury the question of whether the Chairman had been authorized to appoint subcommittees, and decided as a matter of law that the Chairman was so authorized. (See pp. 10-11, *supra*).

There appears to be no basis for the action of the trial Court on this point. The question was one of disputed fact—either the Chairman had been authorized by the Committee, or he had not. An evaluation of the credibility of the Government witness who testi-

fied on the point was essential—was he biased; was his memory good enough to recall a resolution adopted over three years before his testimony; was he telling the truth. It was not even the type of factual question that rests on interpretation of documents. Yet the trial judge arrogated to himself the determination of credibility, and decided the contested issue of authority to appoint. So Petitioner was deprived of the jury trial to which he was entitled under the Constitution.

(2) Mr. Scherer, one of the group who heard Petitioner, testified that he was appointed to the group by telephone call from the Committee Chairman (R. 87). The trial judge charged the jury that the Committee Chairman could appoint by telephone (R. 158). We claim error.

In our day, we have witnessed many excesses by Congressional committees, sufficient to remind the writer of De Tocqueville's dictum that a number of tyrants are no better than one. Many of the excesses are beyond the corrective powers of the Judiciary. But here we respectfully suggest that this Court can, and should hold that Committee authority to its Chairman to appoint subcommittees without specification of the method must be held in law to be limited to a method of appointment more formal and definitive than a mere telephone call without any record made. Cf. *Ex Parte Frankfeld*, 32 F. Supp. 915, 916 (D.C. D.C., 1940). No less would seem to be required when compulsion upon pain of jailing for contempt is used in a First Amendment area.

(3) There was not sufficient evidence before the jury from which it could find that the Committee Chairman had appointed the group of three with Clardy as Chair-

man which heard Petitioner. A verdict should have been directed.

Committee counsel, Mr. Tavenner, testified that at an executive Committee meeting in August 1954 the Chairman appointed a subcommittee of Congressman Scherer as Chairman with Messrs. Clardy and Walter as members to hold hearings at Dayton at any time prior to three weeks before the election in the beginning of November (R. 115, 119). That testimony of an appointment of a subcommittee with a Chairman different from Clardy, to hold hearings at a city different from Washington, at a time different from the time of Petitioner's appearance at Washington was not relevant in any way to a showing of the appointment of the group of three with Mr. Clardy as Chairman who heard Petitioner.

Congressman Scherer testified on cross-examination that the Committee Chairman had telephoned him during the noon recess before the afternoon of Petitioner's appearance "and said that he was appointing Mr. Clardy and Mr. Walter and myself, as the Chairman of the subcommittee, for the purpose of conducting the hearings that afternoon" (R. 87). This evidence of a subcommittee with Scherer as Chairman was also irrelevant to a showing of the appointment of a group of three with Clardy as Chairman before whom Petitioner appeared. On redirect, Mr. Scherer, under the guidance of Government counsel, also testified that his appointment by telephone was to a subcommittee of which Clardy was to be Chairman (R. 89).

There was no evidence at all to show the appointment of Messrs. Clardy and Walter to a subcommittee to hear Petitioner. The whole showing of the Government consisted of a guided statement by Scherer of

his appointment to a subcommittee of which Clardy was to be Chairman; his own statement that he, Scherer, was to be chairman of the group to which he was appointed; and no evidence at all of the appointment of Clardy and Walter.

On this lack of an adequate showing, the jury was left to speculate on the appointment of the group of three that heard Petitioner. Fairly considered, a verdict should have been directed.

(4) The trial judge compounded the error of his refusal to direct a verdict by sending the issue of the appointment of the Clardy group to the jury in a manner that left the jury free to find the appointment of the Washington Clardy group from the Tavenner evidence of a Dayton, Scherer subcommittee. In rejection of Petitioner's view that all of Tavenner's evidence should be passed on by the jury (R. 31-32), the only part of Tavenner's appointment testimony which the jury was permitted to hear was that in August the Chairman had appointed a subcommittee with Clardy, Scherer, and Walter as members. The jury was not permitted to hear that the August appointment was of a subcommittee with Scherer and not Clardy as Chairman and for the holding of hearings in Dayton and not Washington (R. 115, 119). This serious error, plain on the face of the record, was made worse by the trial judge's instruction (R. 158) that the jury could find the appointment of the Clardy group in Mr. Tavenner's evidence as to the appointment of a subcommittee in August.²²

²² Respondent, in reliance on *United States v. Bryan*, 339 U.S. 323, 330-335 and *Emspak v. United States*, 203 F(2) 54, 56, rev'd, on other grounds, 349 U.S. 190, urges that Petitioner cannot raise the lack of a legally-constituted subcommittee for the first time at

Doubtless, the Government will argue that in this heading we concern ourselves with the proof of a mere procedural matter. But the history of the preservation of liberty under law is largely one of the observance of procedural requirements. Beyond that, we offer the suggestion of scarcely anything being more corrosive of the citizen's rights than the judicial acceptance of sloppy Government proof.

V. The Trial Court Should Have Directed a Verdict on All Counts Because the Proof Showed That If Defendant Committed Any Crime, of Contempt, the Crime Was Committed When, Before Any of the Questions Alleged in the Indictment, He Made It Clear That He Was Not Going to Answer Any Questions Concerning Communism.

The fact here is clear. At the very outset of his appearance at Washington, and before any of the questions specified in the indictment were asked of him, Petitioner made a complete refusal on answering any questions at all concerning communism. And at least

trial. Brief for the United States in Opposition, p. 11. Unlike *Bryan*, Petitioner was not convicted of contempt for the purely negative act of "an intentional failure to testify or produce papers." See *Bryan* at p. 329. Petitioner did appear and testify. Unlike *Emspak*, Petitioner appeared at Washington before a three-man group and not a one-man subcommittee that he could then see and object to if he desired. At the time of Petitioner's appearance before the Washington group he could not possibly have observed or known the facts pertaining to its appointment. Cf. *Christoffel v. United States*, 338 U.S. 84, 88. Had Petitioner sought then to ascertain those facts he could not have obtained anything more than the Chairman's self-serving declaration of the appointment of the group—unless this Court had plainly decided, as the Government in effect now asks, that any Committee appearance may begin with a hearing on the validity of the Committee's appointment. In reason, the issue is properly raised and decided at the trial; and the cases so indicate. See *United States v. Moran*, 194 F(2) 623 (C.C.A. 2, 1952), cert. den. 343 U.S. 965; *Eisler v. United States*, 170 F(2) 273, 280 (C.C.A. D.C., 1948); cf. *Christoffel v. United States*, 338 U.S. 84.

by that point, if not sooner, the Subcommittee knew that Petitioner would not answer any of the questions alleged in the indictment. (See pp. 8-9, *supra*)

In these circumstances, the complete refusal at the outset to answer questions concerning communism was a contempt, if there be any here. Thereafter, since the Petitioner at the outset had made clear his position of such complete refusal, the subcommittee could not multiply the contempt, and the punishment, by continuing to ask him questions concerning communism and eliciting the same answer to each individual question. The contempt, if any, was total at the outset when he made his statement of general refusal on the whole subject of communism. The refusals thereafter to answer specific questions cannot be considered anything more than expressions of Petitioner's intention to adhere to his earlier statement. As such they were not separately punishable. At most they were only a continuation of the one contempt already committed. *Yates v. United States*, 355 U.S. 66; *Bevan v. Krieger*, 289 U.S. 459, 465; *Costello v. United States*, 198 F(2) 200 (C.C.A. 2, 1952), cert. den. 344 U.S. 874; see *Bowers v. United States*, 202 F(2) 447, 451, 92 U.S. App. D.C. 79; cf. *United States v. Josephson*, 165 F(2) 82 (C.C.A. 2, 1947), cert. den. 333 U.S. 838; and *Orman v. United States*, 207 F(2) 148 (C.C.A. 3, 1953).

The *Costello* case, approved by the Court and accepted by the Government as correct in *Yates v. United States*, 355 U.S. 66, 73, is persuasive here. A quotation from that opinion (198 F(2) at p. 204) sets forth the problem there, which is not distinguishable from the problem here, and the Court's decision thereon:

We are of the opinion that the convictions on Counts Seven, Nine, Ten, and Eleven, must be reversed. Each of those counts dealt with the defend-

ant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on that particular day. Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusal to answer specific questions cannot be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable.

The petitioner in *Yates* had refused, as did Petitioner here, to answer questions in a stated area of interrogation, and was then found guilty of contempt on eleven individual questions which followed. There, the Government sought to distinguish *Costello* on the ground that the refusal in *Yates* was not a refusal to answer *any* questions. That attempted distinction was rejected (*Yates* at p. 73), and must be rejected here. *Yates* requires the determination that Petitioner, if he committed any contempt, committed but one contempt in his Washington appearance. Such contempt, under the controlling doctrine of *Yates* on this point, was a single contempt, complete on Petitioner's general refusal to answer questions concerning communism and continuing through the refusals to answer individual questions. But that is not the crime charged against Petitioner in the indictment. The indictment makes no reference to a general refusal to answer questions concerning Communism, and charges sixteen separate contempts. So Petitioner was tried, convicted and

sentenced on the basis of a charge of sixteen contempts. Such conviction was plainly erroneous under *Yates*.

But here, unlike *Yates*, the remedy is not the setting aside of the conviction for the sole purpose of resentencing. *Yates* was a case of criminal contempt committed in the presence of the trial court, and punished summarily. In such a case, as the Court noted in *Yates* at p. 69, it was only necessary under Rule 42(a) of the Federal Rules of Criminal Procedure for the trial judge to certify that he saw or heard the contemptuous conduct, and to recite the facts in his order of contempt. In *Yates*, as the Court specifically observed at p. 70, there was no question as to the form or content of the specifications of the contempt found. So it was possible in *Yates* to affirm the conviction (in effect) on the basis of one continuing contempt. Here, Petitioner had a right to be tried only upon the indictment of the Grand Jury. 2 U.S.C. Sec. 194; Constitution, Art. V. The indictment did not charge Petitioner with one continuing contempt, but alleged sixteen separate contempts which under *Yates* were not punishable offenses. The indictment was also invalid in failing to apprise Petitioner with reasonable certainty, of the nature of the accusation against him, to the end that he might prepare his defense. See the cases cited *supra*, at pp. 42-43. One contempt is not sixteen contempts. Defense preparation and trial of one contempt charge differs from preparation and trial of sixteen contempt charges—and not only in consideration of whether a plea of guilty or *nolo contendere* would be in a defendant's best interest. Cf. p. 37, *supra*. For these reasons, the indictment must be dismissed.

In any event, since indictment, trial, and conviction here were on the invalid basis of sixteen separate of-

fenses, due process does not permit affirmance on an otherwise valid basis of one contempt, for Petitioner was never accorded an opportunity to meet a one contempt charge. See the cases cited at p. 47, *supra*. Petitioner's invalid conviction cannot be validated on review and must be set aside.

VI. The Conviction Should Be Reversed Because It Is Not Supported by the Proof of Pertinence at Trial.

In making its showing of pertinence at the trial, the Government was required to prove a subject under inquiry. *Deutch v. United States*, 367 U.S. 456. This the Government failed by far to do.

At the outset of Petitioner's trial, the Government announced its primary position to be that the subject under inquiry was as broad as the powers conferred upon the Committee by H. Res. 5 which established it (R. 43). The Government maintained that position throughout the trial. Its last witness, Committee Counsel, claimed that of the matters entrusted to the full Committee no particular subject was singled out for the hearings at which Petitioner testified (R. 115). This proof cannot support the conviction; for the House resolution which empowers this Committee cannot validly serve as the subject under inquiry. *Watkins v. United States*, 354 U.S. 178.

The Government's proof of "special pertinence" touched upon a myriad of separate and distinct possible subjects, which in sum total vaguely comprise the vague, full powers conferred up on the Committee by H. Res. 5. See pp. 12-16, *supra*. The Government offered no proof to connect any of these many possible subjects with the questions on which Petitioner was convicted; and no connection is apparent.

Here the Government does not claim any of these many possible subjects on which it touched at trial as the subject under inquiry when Petitioner testified. Instead it is claimed that the subject under inquiry was "Communist activity at Antioch College." Brief for the United States in Opposition, p. 10. No such contention, or proof of such contention was offered at trial as a subject under inquiry. The questions on which Petitioner was convicted (R. 3) are not, in and of themselves, related to "Communist activity at Antioch College." Proof of a connection between those questions and the subject now claimed was introduced by the Government at trial not as part of its proof of pertinence but expressly in attempted refutation of Petitioner's contention of no legislative purpose (See Point III, *supra*, p. 51.)³³

In these circumstances, the trial judge rather plainly found pertinence on the basis of a prohibited subject under inquiry—H. Res. 5 which established the Committee. And, in any event, no other subject under inquiry was proven beyond a reasonable doubt. The trial judge, no more than a jury, was free to speculate among the many possible subjects of inquiry the Gov-

³³ Committee Counsel, Mr. Tavenner, was the Government's only witness on pertinence. During his testimony on direct, the Government introduced all of the many possible subjects of inquiry which it does not now claim (R. 32-60). Petitioner's cross-examination (R. 62-84, 91-99) was completely devoted to proving no legislative purpose. On redirect, the prosecutor with express reference to the testimony on lack of legislative purpose which petitioner had elicited on cross-examination (R. 105-106) went on, in attempted refutation of that testimony, to get such connection between the indictment questions and communism at Antioch College as the Government now relies on for pertinence (R. 109-112).

ernment touched on either as subjects under inquiry or in attempted refutation of no legislative purpose. The directed verdict requested by Petitioner (R. 19) should have been granted.³⁴

CONCLUSION

The conviction should be reversed with directions to dismiss.

Respectfully submitted,

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Dated: October, 1961.

³⁴ Of course, the Government cannot now, consistently with Due Process, support the conviction on the basis of a theory as to subject under inquiry not advanced at trial. See the cases cited *supra*, at p. 47.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 8

NORTON ANTHONY RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 280 F. 2d 688.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960. The petition for a writ of certiorari was granted on June 19, 1961 (R. 169; 366 U.S. 960). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could properly be convicted for refusing to answer specific questions as to his Communist activities because he stated his refusal to

answer any question on Communism at the start of his appearance as a witness before a subcommittee of the House Un-American Activities Committee.

2. Whether the trial court correctly held that, as a matter of law, the subcommittee was properly constituted.

3. Whether the trial court erred in holding, as a matter of law, that the inquiry had a valid legislative purpose.

4. Whether the government proved that the questions were pertinent to the subject under inquiry.

5. Whether a defendant who is indicted by a grand jury composed, in part, of federal employees is entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors are biased and afraid as the result of the government security program.

6. Whether the indictment was invalid because it failed to specify the subject under inquiry and the pertinency of the questions to that subject.

STATUTE INVOLVED

The statute involved is 2 U.S.C. 192, which appears at page 4 of petitioner's brief.

STATEMENT

Petitioner was charged in a sixteen-count indictment with having unlawfully refused to answer sixteen questions pertinent to matters under inquiry by a subcommittee of the Committee on Un-American Activities of the House of Representatives (R. 2-5).

He was convicted on counts 2, 3, and 4¹ (R. 164), and sentenced to thirty days' imprisonment and a fine of five hundred dollars on each count, the sentences to run concurrently (R. 29). On appeal, petitioner's conviction was affirmed (R. 166-167).

The pertinent facts may be summarized as follows:

Petitioner was called on September 15, 1954, before a subcommittee of the House Committee on Un-American Activities holding hearings in Dayton, Ohio, as part of its investigation into Communist activity in the Dayton-Yellow Springs² area (R. 33-34, 41-42).³ Although the subcommittee conducting the Dayton hearings was composed of three members, only the chairman was present when petitioner appeared (R. 61, 108). Counsel for the Committee testified at the trial that petitioner was called, despite the fact that a quorum was not present and the subcommittee was not a validly operating subcommittee, because there was some prospect of petitioner's being a "cooperative" witness (R. 68, 109).

¹ The trial court directed acquittal on the remaining counts after they were abandoned by the government because the subcommittee failed to order petitioner to answer these other questions after his initial refusal to answer, or, as to one count, the question was subsequently answered by petitioner at the hearing (R. 131-132, 153).

² Dayton and Yellow Springs are approximately twenty miles apart (R. 129).

³ The opening statement of the chairman of the subcommittee giving the purpose of the Dayton hearings is contained in Government Exhibit 3 (Hearings Before the House Committee on Un-American Activities: *Investigation of Communist Activities in the Dayton, Ohio Area* (hereinafter "Hearings"), 83d Cong., 2d Sess.) and is set forth in the record at pp. 38-42.

Petitioner was not cooperative, although he answered the preliminary questions asked him. He testified that he graduated from Antioch College in 1942, and that he worked in Dayton from 1942 until 1948, and from 1948 until the hearings, at Vernay Laboratories in Yellow Springs (Hearings, p. 7009). He stated that, while a student at Antioch, he knew a Herbert Reed but did not know Reed's occupation (*id.* at p. 7011). The Committee counsel told petitioner that he had been identified by Arthur Strunk during the hearings as a "dues paying member of the Communist Party" in Dayton before moving to Yellow Springs in 1948 (*ibid.*). Petitioner objected on the ground of the First Amendment when asked several questions relating to Communist activities (*id.* at pp. 7010-7011).

Upon petitioner's refusal to answer these questions, counsel for the Committee excused the witness (R. 63-64). Though the witness was not kept under subpoena, the intention of Committee counsel was to report to the Committee the other questions he wished to ask petitioner so that the Committee could decide whether or not petitioner should be recalled (R. 64). Committee counsel reported to the Committee that he felt that petitioner had been influenced during the hearings in Dayton by the fact that his appearance was not before a legally constituted subcommittee and that he might cooperate if called before the Committee in Washington (R. 113).

Before petitioner's appearance at the hearings in Dayton, Arthur Strunk, who had become a Party member at the request of the F.B.I. (R. 45), testified

that petitioner was a Party member; that several Party meetings had been held in petitioner's house; that he had paid Party dues to Strunk; and that petitioner had not been a very active Party member after he started working in Yellow Springs in 1948 (R. 48-49). The subcommittee also heard testimony in Dayton concerning the organizational structure of the Dayton section of the Communist Party (R. 46-47); Communist infiltration of the leadership of locals of the United Electrical, Radio and Machine Workers Union in the area (R. 50-56); and the existence of a Communist youth organization, the Young Communist League, at Antioch College which is located at Yellow Springs (R. 123). The subcommittee was told that the Young Communist League at Antioch was organized and run by Herbert Reed,^{*} a Communist Party organizer in the Dayton area; that Reed contacted members of the League after graduation to bring them into the Dayton section of the Party; that many had been brought into active Party work; and that at least one such member had also been employed by the United Electrical Workers^{*} (R. 112, 113, 123, 127-128). The Committee considered it important to pursue this information in order to understand Communist activ-

^{*} Reference of the Committee counsel to "John" Reed (R. 112) was apparently an error, since this is the only time a John Reed is mentioned as a Party organizer in Dayton, and there are repeated references to Herbert Reed as a Party organizer (see, e.g., R. 49, 62, 66).

^{*} In addition, the Committee had information that several former members of the Young Communist League had become prominent in the United Electrical Workers, although it had no knowledge of subsequent Communist Party activity on their part (R. 114).

ity in the Dayton-Yellow Springs area (R. 113-114, 127).

While the Committee had knowledge of the activities of the Young Communist League at Antioch in 1942 and of a Communist Party group in Yellow Springs in 1945 and 1946, it had no information concerning the period from 1942 to 1945. The Committee desired to establish the "missing link" between 1942 and 1945, especially since testimony indicated that, while there was no faculty participation in 1942, in 1945 and 1946 members of both the faculty and student body of Antioch College were members of the Communist Party cell at Yellow Springs (R. 112, 125, 126). Therefore, the Committee was particularly anxious to obtain this information which it believed petitioner could supply (R. 112, 123, 126-128). Committee counsel also testified that the Committee desired to know more from petitioner about a Walter Lohman (R. 113-114), a labor official at Vernay Laboratories, who had been identified by Strunk as a member of the Communist Party (R. 52, 56; Hearings, pp. 6832, 6856).

Petitioner testified in Washington on November 17, 1954, during an afternoon session conducted by a three-man subcommittee (R. 85, 89), which had been appointed during the noon recess by the Committee Chairman (R. 85, 87). Notice of the appointment, which the Chairman had made by telephone (R. 87), was entered in the record of the hearings at the beginning of the session at which petitioner testified (R. 84-87; Gov. Ex. 6), and announcement of this fact was made at the hearing (R. 120). At no time during the course of the hearing did petitioner object to

the composition or appointment of the subcommittee before which he appeared (R. 121-131).

After answering preliminary questions at this hearing, petitioner said that he knew John and Bebe Ober while he was a student at Antioch College (R. 123). The Committee counsel told petitioner that they had testified before the Committee that there had been a cell of the Young Communist League at Antioch while they were attending that college; that the cell was organized and conducted by Herbert Reed, who was not connected with the College; and that Herbert Reed was a Party organizer in the Dayton area (R. 123). Petitioner testified that he knew Herbert Reed but had not seen him since the middle nineteen-forties (R. 124). After petitioner refused to answer as to the occasion on which he had last seen Herbert Reed on the ground of the First Amendment (count 1, which was dismissed), the Committee counsel stated that the Committee had information from Mr. and Mrs. Ober as to Herbert Reed's connection with the cell of the Young Communist League at Antioch up to 1942 and had heard testimony from Professor Robert Metcalf that Herbert Reed was a member of a Party group in 1945 and 1946 (R. 125; see Hearings, pp. 6987, 6988, 6993-6994). The Committee counsel told petitioner that the Committee did not know the Party's organizers between 1942 and 1945 and that it wanted petitioner to provide this information (R. 126). Subsequently, the Committee counsel said that Mrs. Ober had testified that she had been active in the Young Communist League at Antioch; that after she left Antioch she obtained a

position with a local union in Dayton; and that Herbert Reed approached her and "brought [her] into the Communist Party itself" (R. 127; see Hearings, p. 6992). Petitioner was then asked (R. 127):

Now, I want to ask you whether or not Herbert Reed, after you left Antioch College, encouraged you in any manner to join the Communist Party when you saw him in the mid-forties. Whether you did or whether you didn't join at that time, did he encourage you to join?

Petitioner refused to answer again relying solely on the First Amendment (R. 127) and this refusal became the basis of count 2 of the indictment.

Committee counsel repeated that the Committee had information that Herbert Reed organized a group of students at Antioch; that he "attended every meeting," "lectured to them on Communism," and "directed their every movement"; that when the students left school he followed them; and that he got Mr. and Mrs. Ober into the Communist Party (R. 127-128). Petitioner was then asked (R. 128): "I want to know whether Herbert Reed had anything to do with your getting into the Communist Party." Petitioner refused to answer and this refusal became the basis of count 3.

The Committee counsel told petitioner that the Committee had received information during its investigation concerning the Young Communist League group at Antioch College between 1939 and 1941, but this information did not indicate that any professor at the College was associated with the group. Nevertheless, according to the Committee counsel, in 1945

and 1946 there was an organized Party group in Yellow Springs including both faculty members and students (R. 129; see Hearings, pp. 6979-6982). Petitioner was then asked (R. 129): "Do you have any knowledge of the existence of that group in 1945 or 1946?" Petitioner refused to answer, and this refusal became the basis of count 4.

Petitioner refused to answer a series of other questions as to which he was indicted (counts 5-16). Among these questions was whether he had ever attended any Communist Party meetings with Walter Lohman and whether Lohman ever attended any Party meetings in petitioner's home (counts 14 and 15) (Hearings, pp. 7086-7087).^{*} These counts were abandoned by the government and dismissed by the trial court (see *supra*, p. 3, note 1).

SUMMARY OF ARGUMENT

I

Petitioner's indictment and conviction on separate counts for each refusal to answer was proper.

This Court has held in *Yates v. United States*, 355 U.S. 66, 73, that a witness cannot be punished for more than one contempt, even though he refuses to answer more than one question, if he states his refusal to answer "any questions" or refuses to answer "questions within a generally defined area of investigation," and the subsequent questions are within this area.

^{*} Petitioner first refused to answer whether he knew Lohman to be a Party member (count 14), but he subsequently stated that he did not know (Hearings, pp. 7086-7087).

Here petitioner never refused at the hearings in Washington to answer all questions or all questions on a particular subject. He merely invoked the First Amendment as to particular questions.

Even if petitioner is correct and Yates forbids separate punishment in these circumstances, petitioner could properly be convicted and punished for any one of his refusals to answer. This is in effect what happened since petitioner was given concurrent sentences on each count. Therefore, if the sentence on any one count is valid, the judgment below must be affirmed.

II

The trial court correctly held that, as a matter of law, the subcommittee before which petitioner appeared was properly constituted. While petitioner makes a series of contentions that the trial court's determination was erroneous, these claims are not available to him since he failed to assert, when he appeared before the subcommittee, that it was improperly constituted. In any event, petitioner's claims are without merit.

A. The trial court correctly determined that the issues whether the Committee Chairman had the authority to appoint subcommittees, and whether such appointments could be made by telephone, were questions of law which should not be submitted to the jury. The issues are analogous to questions as to the requirements of a quorum and whether a committee has authority to conduct a particular investigation, which this Court decided as questions of law in *Christoffel v. United States*, 338 U.S. 84, and *Barenblatt v. United States*, 360 U.S. 109.

B. The Committee Chairman had authority to appoint subcommittees and to do so by telephone. The uncontradicted evidence shows that the Committee passed a resolution authorizing its Chairman to appoint subcommittees to perform the functions of the Committee. There is no authority or reason requiring that such an appointment take any particular form or include any specific formality.

C. There was ample evidence that the subcommittee before which petitioner appeared was properly appointed. The evidence showed that the Committee Chairman telephoned one of the members of the subcommittee and told him the three members who were to constitute the subcommittee. The transcript of the hearing shows that two of the three members of the subcommittee were present when petitioner testified.

D. The trial court's instructions to the jury did confuse the appointment of an earlier subcommittee with the appointment of the subcommittee involved in this case. But it is unlikely that petitioner was seriously prejudiced since the evidence of the appointment of the subcommittee before which petitioner appeared was uncontradicted. Moreover, petitioner made no objection to the instructions, and, indeed, the only instruction he submitted on this issue was given.

III

The trial court properly held, as a matter of law, that the subcommittee's questioning of petitioner was pursuant to a valid legislative purpose.

A. The trial court was correct in deciding this issue rather than submitting it to the jury. This Court has

repeatedly decided this issue as a matter of law. *E.g.*, *Kilbourn v. Thompson*, 103 U.S. 168; *Barenblatt v. United States*, *supra*. This is clearly correct since the question whether a committee has a valid legislative purpose, like the issue whether the First Amendment has been violated, is a legal question.

B. The Committee clearly had a valid legislative purpose in subpoenaing petitioner to testify. Petitioner argues, without any support in the evidence, that, because petitioner refused to answer questions asked by a subcommittee two months earlier, the only reason the Committee could possibly have decided to subpoena him was in order to punish him for contempt. Thus, petitioner is in effect imputing improper motives to members of the Committee without any evidentiary basis. This Court, however, has categorically refused to do this. *E.g.*, *Watkins v. United States*, 354 U.S. 178, 200.

Moreover, the evidence shows that the Committee recalled him because it reasonably believed that he might be more cooperative. First, the earlier appearance was before an illegally constituted subcommittee. While petitioner did not explicitly base his refusal to answer on these grounds, the Committee thought that this might have been a factor. Second, the earlier hearings left a "missing link" in the Committee's information concerning Communist activities. The Committee believed petitioner had this information and hoped to persuade petitioner to provide it. And, finally, most of the questions asked at the later hearing, including all three questions as to which he was convicted, were never asked petitioner before. Since petitioner never stated that he would refuse to answer all questions asked by the Committee, or even

all questions in a certain area, the Committee could not know he would not answer these new questions.

IV

The government proved at petitioner's trial that the questions were pertinent to the subject under inquiry: Communist activities in the Dayton-Yellow Springs area. The transcript of the Dayton hearing at which petitioner first testified showed that this was the subject under inquiry at that hearing. At the start of the hearing in Washington—which is the hearing directly involved here—the Chairman of the Committee stated that the new hearing was a continuation of the Dayton investigation. Moreover, throughout petitioner's testimony at both hearings, it is clear petitioner was being questioned concerning Communist activities in Dayton and particularly at Antioch College, which is in Yellow Springs. All three questions as to which petitioner was convicted were pertinent, either on their face or as shown by the government's evidence, to the subject under inquiry.

V

Petitioner claims that he was entitled to dismissal of the indictment or at least a hearing because of the bias of government employees who were on the grand jury. As we have shown in our brief in *Shelton v. United States*, No. 9, pp. 62-76, a defendant cannot challenge an indictment because of the bias of grand jurors unless he can show specific and convincing evidence of strong bias in individual grand jurors. Here, as in *Shelton*, petitioner made no allegations with respect to the bias of individual grand jurors.

VI

Petitioner contends that the indictment was required to specify the subject under inquiry and the pertinency of the questions to that subject. As shown in our brief in *Shelton, supra*, pp. 78-83, under Rule 7(c) of the Federal Rules of Criminal Procedure and the decisions of this Court and the courts of appeals, an indictment need not specify the subject under inquiry. For the same reasons, it need not provide the reasoning underlying the allegation that the questions were pertinent.

ARGUMENT

Petitioner was convicted of contempt of Congress for refusing to answer three questions asked him by a Congressional committee concerning his activities within the Communist Party—whether Herbert Reed encouraged petitioner to join the Communist Party when petitioner left Antioch College (count 2); whether Herbert Reed had anything to do with petitioner's getting into the Communist Party (count 3);¹ and whether petitioner had any knowledge of a Communist Party group in Yellow Springs composed, in part, of faculty members and students at Antioch College (count 4). Since petitioner was given a concurrent sentence and a fine on all three counts which was less than the maximum authorized by 2 U.S.C.

¹ It is possible that the questions involved in counts 2 and 3 are so closely related that they should be considered as seeking the same information and therefore that petitioner's conviction on count 3 was improper. It is not necessary, however, to consider this issue, since petitioner received a concurrent sentence on all three counts.

192 under any one count, the judgment below must be affirmed if any one of the counts is upheld. *E.g.*, *Barenblatt v. United States*, 360 U.S. 109, 115.

I

PETITIONER'S INDICTMENT AND CONVICTION ON SEPARATE COUNTS FOR EACH REFUSAL TO ANSWER WAS PROPER

Petitioner was indicted, convicted, and given concurrent sentences for his refusal to answer three different questions. He contends (Pet. Br. 60-64), that since he refused at the outset to answer any questions on the subject of Communism, he may not be separately indicted, convicted, and punished for subsequently refusing to answer specific questions on that subject. In fact, petitioner claims that he cannot be convicted on any of the three counts, because the indictment charged separate contempts based on each refusal to answer and did not charge that his general refusal to answer questions concerning Communism was a contempt.

Petitioner relies on *United States v. Costello*, 198 F. 2d 200 (C.A. 2), certiorari denied, 344 U.S. 874, and *Yates v. United States*, 355 U.S. 66. In *Costello*, the witness told a Congressional committee during a hearing that he was too ill to testify and that "under no condition will I testify from here in, until I am well enough" (198 F. 2d at 203). Nevertheless, the committee continued to question the witness, he refused to answer, and he was separately indicted and convicted for each refusal to answer. The Second Circuit reversed the counts based on his refusal to answer the separate questions on the ground that a

witness cannot be punished for refusing to answer questions (198 F. 2d at 204):

put to him after he had flatly refused to give any further testimony on that particular day. . . . [W]hen the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable. [Emphasis in original.]

In *Yates*, a witness at a criminal trial refused to answer questions concerning membership in the Communist Party by other persons. She then told the court: "However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it" (355 U.S. at 68). Two days later, the witness refused to answer eleven questions calling upon her to identify other persons as Communists, and the trial court found her guilty of eleven contempts. This Court reversed the convictions on ten of the specifications, holding (355 U.S. at 73):

[T]he prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers. . . .

. . . [I]t appears that every question fell within the area of refusal established by peti-

tioner on the first day of her cross-examination. The Government admits, pursuant to the holding of *United States v. Costello*, 198 F. 2d 200, that only one contempt would result if Mrs. Yates had flatly refused on June 26 to answer *any* questions and had maintained such a position. We deem it *a fortiori* true that where a witness draws the lines of refusal in less sweeping fashion by declining to answer questions within a generally defined area of interrogation, the prosecutor cannot multiply contempts by further questions within that area. [Emphasis in original.]

Thus, the *Costello* and *Yates* cases establish that a witness cannot be punished for more than one contempt, even though he refuses to answer more than one question, if (1) he states his refusal to answer "any questions," or (2) refuses to answer "questions within a generally defined area of interrogation" and the subsequent questions come within this area. Petitioner is therefore correct that he could not be indicted, convicted, and sentenced separately for his refusal to answer the three questions if, as he claims, he made a "complete refusal at the outset to answer questions concerning communism" (Pet. Br. 61). On the other hand, the *Costello* and *Yates* cases do not require that the witness be indicted for his general statement of refusal to answer. It is perfectly consistent with those cases to hold the witness in contempt for one of his actual refusals to answer a question. Indeed, that is precisely what this Court did in *Yates* by upholding the contempt conviction based on the first specification—which charged the first refusal to

answer—rather than reversing the conviction in its entirety because none of the specifications was based on the broad refusal to answer made two days earlier.* Even if petitioner had stated that he would not answer any questions on the subject of communism, and therefore he could not be properly convicted and sentenced on *all* three counts, we submit that his conviction on *one* of the counts would be valid. And, since he received concurrent sentences on all three counts, his conviction must be affirmed if any one count is valid.

But the fact is that petitioner never refused to answer all questions even on a particular subject. Rather, he invoked the First Amendment in response to particular questions but did not state that he would refuse to answer future questions.

Petitioner's first refusal to answer at the Washington hearings was made in response to a question concerning the circumstances under which he saw Herbert Reed (R. 124). In answering questions up to that point, petitioner had described his educational and employment background; he had admitted being acquainted with John and Bebe Ober and Herbert Reed; and had testified concerning the last time he

* In *Costello*, unlike the instant case, the witness was charged in one count with refusing to answer any questions and in separate counts with refusal to answer particular questions. Therefore, the court of appeals properly held that all three counts based on particular refusals to answer were invalid since they duplicated the count charging the witness' total refusal to answer. But this does not mean that, where no count alleges a total refusal to answer, every one of the counts charging refusals to answer specific questions is invalid.

had seen Reed (R. 124). Petitioner was then asked as to the occasion he had last seen Reed, and he responded (R. 124):

I believe I will decline to answer *that* question on the same grounds that I declined to answer similar questions at the public hearing at Dayton. That is, Mr. Tavenner, it is my belief that the First Amendment to the Constitution, as well as the spirit of the whole Bill of Rights, protects me against being forced to disclose any information about my opinions and political beliefs and associations. [Emphasis added.]

Subsequently, petitioner refused in similar fashion to answer particular questions on the ground of the First Amendment (R. 125-131). However, he also answered certain questions, including those admitting he was acquainted with Arthur Strunk who petitioner was told was a member of the Communist Party (R. 131; Hearings, p. 7084) and Walter Lohman, who he knew had been indicted for filing a false non-Communist affidavit and who he was told had been identified by Strunk as a Party member (Hearings, pp. 7086-7087).*

* During his appearance before the subcommittee in Dayton, the first question petitioner refused to answer was whether he was aware of a Young Communist League organization within the student body while he was a student at Antioch College. He stated that "[i]t is my understanding that the first amendment to the Constitution protects me from being forced to disclose any information about my opinions, political beliefs, and associations. I believe that *that* question violates that privilege, and I therefore decline to answer" (emphasis added) (Hearings, p. 7010). Subsequently, although he refused to answer several questions on the ground of the First Amendment, he admitted knowing Herbert Reed and stated that he did not know Reed's occupation (*id.* at p. 7011).

Thus, petitioner did not flatly refuse to answer any and all questions, nor did he decline to answer questions within a generally defined area. His refusal to answer specific questions concerning his associations and activities did not define any area of refusal. Petitioner's actions amounted merely to an attempt to select the questions he would and would not answer.

II

THE TRIAL COURT CORRECTLY HELD THAT, AS A MATTER OF LAW, THE SUBCOMMITTEE WAS PROPERLY CONSTITUTED

Petitioner claims that the trial court committed four separate errors concerning the issue whether the subcommittee was legally constituted: (1) deciding the issues whether the Chairman of the Committee had authority to appoint subcommittees, and whether he could do so by telephone, as matters of law instead of submitting them to the jury (Pet. Br. 56-57); (2) holding that the Committee Chairman could validly appoint subcommittees by telephone (Pet. Br. 57); (3) failing to direct a verdict for petitioner on the ground that there was no evidence that the Chairman of the Committee had appointed the particular subcommittee which heard petitioner's testimony (Pet. Br. 57-59); and (4) instructing the jury in effect that evidence of the appointment of a subcommittee with Representative Scherer as chairman to hold hearings in Dayton constituted proof of the appointment of a subcommittee with Representative Clardy as chairman to hold hearings in Washington (Pet. Br. 59).

These contentions, however, are not available to petitioner since he made no objection to the constitution of the subcommittee at the time he appeared before it. As we have shown in our briefs in *Shelton v. United States*, No. 9, this Term, pp. 25-29, and *Liveright v. United States*, No. 11, this Term, pp. 29-32, such objections to the committee's procedure cannot be raised for the first time at trial. *United States v. Bryan*, 339 U.S. 323, 330-335; *Emspak v. United States*, 203 F. 2d 54, 56 (C.A.D.C.), reversed on other grounds, 349 U.S. 190. If petitioner had challenged the constitution of the subcommittee when he appeared before it, his objections could easily have been satisfied by the committee. "To deny the Committee the opportunity to consider the objection or to remedy it is in itself a contempt of its authority and an obstruction of its processes." *United States v. Bryan*, 339 U.S. 323, 333. In any event, as we will now show, the trial court did not err.

A. The trial court concluded that the issues whether the Committee Chairman had the authority to appoint subcommittees and whether such appointment could be made by telephone were questions of law which should not be submitted to the jury (R. 144, 156). As observed by the court of appeals (R. 167), these are legal questions within the trial court's province. They are analogous to the question which was decided by this Court in *Christoffel v. United States*, 838 U.S. 84, as to the requirements of a quorum when a witness testified before a Congressional committee as contrasted to the issue whether a quorum was actually present, which was left for the jury to decide. They

are also analogous to the issue in *Barenblatt v. United States*, 360 U.S. 109, 116-123, as to whether the committee had authority to conduct a particular investigation, which this Court likewise decided as a question of law. The trial court properly left to the jury the only questions of fact: whether the subcommittee was in fact appointed by the Chairman and whether it was acting during petitioner's appearance (R. 144, 157-158).

B. The trial court properly ruled that the Committee Chairman had the power, consistent with the practice of the Committee (R. 87, 116), to appoint subcommittees and to do so by telephone. A House committee may adopt rules, may appoint subcommittees, and may confer on them powers delegated to the Committee. Deschler, *Rules and Manual, United States House of Representatives* (H. Doc. 458, 85th Cong., 2d Sess.) § 735; I Hinds' *Precedents of the House of Representatives* (1907) § 707; III *id.* at §§ 1841, 1842; VI Cannon's *Precedents of the House of Representatives* (1936) § 532; VIII *id.* at § 2214. The Committee on Un-American Activities, on January 22, 1953, passed a resolution authorizing its Chairman to appoint subcommittees from time to time to perform the functions of the Committee (R. 135).¹⁰ Since neither the House nor the Committee

¹⁰ This evidence was introduced by the testimony of the Committee counsel. Although petitioner's counsel asked if the witness had a copy of the resolution in court (the answer was he did not), petitioner's counsel made no objection to the receipt of the oral testimony concerning the resolution (R. 135). There was no evidence contradicting this testimony.

has any rule with respect to the method by which the Chairman must appoint subcommittees (R. 134), there is no authority or reason requiring that such appointment take any particular form or include any specific formalities. See *Meyers v. United States*, 171 F. 2d 800, 811 (C.A.D.C.), certiorari denied, 336 U.S. 912.

Petitioner contends that this Court should hold, apparently as a constitutional requirement, that Congressional committees must appoint their subcommittees by a method "more formal and definitive than a mere telephone call without any record made" (Pet. Br. 57). No judicial decision, however, has ever come close to prescribing the procedure by which a Congressional committee can constitute its subcommittees. The method followed is clearly to be determined by Congress, or, if it does not act, by its committees—not by the courts. The courts can only require that the authority of the subcommittee be shown at the trial for contempt. Here there was ample evidence demonstrating this authority.

C. The evidence before the jury clearly established that the subcommittee before which petitioner appeared was properly appointed. Congressman Scherer, a member of the Committee, testified that he, Congressman Clardy, and Congressman Walter were

"The only case cited by petitioner is *Ex parte Frankfeld*, 82 F. Supp. 915, 916 (D. D.C.). That case, however, holds that the secretary of the committee could not report the contempt of a witness to the House; instead, such a report, like any other report to the House, must be made by the committee itself, "as is prescribed by the Manual of Rules of the House" (id. at 917).

appointed by the Chairman of the Committee, at the recess between morning and afternoon hearings, to a subcommittee to hold the hearing that afternoon at which petitioner appeared (R. 85). Congressman Scherer further testified that the appointment of the three Congressmen was made by a telephone call from the Chairman to himself (R. 87).² Announcement of the appointment was made at the start of the afternoon hearing (R. 120). The transcript of the hearing shows that at least two of the three members of the subcommittee were present when petitioner testified (R. 120-121; see R. 85-86, 120).

D. The Committee counsel testified before the jury concerning the appointment of a subcommittee in August 1964, to hold hearings in Dayton, to be composed of Congressman Scherer, Clardy, and Walter, with Congressman Scherer as chairman (R. 115, 119, 120-121). Petitioner argues that the jury could have been confused by this testimony into believing that this appointment of a subcommittee in August 1964 constituted appointment of the subcommittee which heard petitioner in Washington on November 17, 1964, possibly because the latter subcommittee had the same members, although Congressman Clardy was chairman. On its face, this confusion seems hardly likely since the jury heard testimony from

² Petitioner relies (Pet. Br. 58) on a somewhat ambiguous statement by Congressman Scherer at the trial suggesting that he was appointed chairman of the subcommittee (R. 87). If this was the meaning of the statement, it constitutes an insignificant error. Congressman Scherer later testified that Congressman Clardy was appointed chairman (R. 89), as the transcript of the hearing shows (R. 120).

Congressman Scherer that the subcommittee before which petitioner appeared in Washington was appointed on the day of the hearing (see *supra*, pp. 23-24). Moreover, petitioner did not object to this testimony of Committee counsel or even attempt, through cross-examination, to show that the appointment in August 1954 was not of the subcommittee which held the hearing in Washington.

It is true, as petitioner emphasizes, that the trial court instructed the jury that it could find that the subcommittee holding the hearing in Washington was properly appointed either on the basis of Congressman Scherer's testimony concerning the Chairman's telephone call on the day of the hearing or on the basis of the Committee counsel's testimony concerning the designation of a subcommittee to hold the hearing in Dayton. We agree that this instruction, insofar as it allowed the jury to find that the subcommittee in Washington was appointed on the basis of the Committee counsel's testimony, did confuse two different subcommittees. However, we do not believe that petitioner was seriously prejudiced since Congressman Scherer's testimony as to the appointment of the subcommittee was uncontradicted. Moreover, petitioner made no objection to these instructions and, indeed, the only instruction he requested on this issue was given (R. 23-24). As Rule 30 of the Federal Rules of Criminal Procedure specifically states: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

III

THE TRIAL COURT PROPERLY HELD, AS A MATTER OF LAW, THAT THE SUBCOMMITTEE'S QUESTIONING OF PETITIONER WAS PURSUANT TO A VALID LEGISLATIVE PURPOSE.

Petitioner contends (Pet. Br. 51-55) that (1) the question whether the Committee subpoenaed petitioner to testify in Washington pursuant to a valid legislative purpose should have been submitted to the jury and (2) in any event, the trial court should have found that there was no valid legislative purpose. Both contentions are without merit.

A. Petitioner cites no authority, and as far as we can determine can cite none, for the proposition that the trial court was required to submit to the jury the question whether the Committee was acting pursuant to a valid legislative purpose. On the contrary, this Court has repeatedly decided this issue for itself, thereby implicitly holding that it is not properly a question for the jury. *Kilbourn v. Thompson*, 103 U.S. 168; *McGrain v. Daugherty*, 273 U.S. 135, 176-180; *Barenblatt v. United States*, *supra*, 360 U.S. at 127-133; *Wilkinson v. United States*, 365 U.S. 369, 400-412; *Braden v. United States*, 365 U.S. 431, 434-435. These implicit holdings are clearly correct since the question whether a committee had a valid legislative purpose, like the issue whether the First Amendment has been violated, is a legal question which is properly decided by the trial and appellate courts.

B. The trial court's decision in this case that the Committee was acting pursuant to a valid legislative

purpose (R. 156) is fully supported by the evidence. Petitioner contends that the only purpose the Committee could have had for subpoenaing him to appear in Washington after he had previously refused to testify in Dayton was to punish him for contempt. This contention, however, wholly rests on an unproved assumption that the Committee believed that petitioner could not be punished for contempt because the subcommittee before which he appeared in Dayton did not have a quorum. Petitioner did not base his refusal to answer on this basis—he relied entirely on the First Amendment (see *supra*, pp. 7, 8)—and therefore, as we show in our briefs in *Shelton v. United States*, *supra*, pp. 25-29, and *Liveright v. United States*, No. 11, this Term, pp. 29-32, he could not raise this issue at a trial. Petitioner offers no evidence that the Committee erroneously believed that petitioner could not be punished for contempt committed in Dayton.

In any event, there is a more important reason why petitioner's contention is insubstantial. He bases his claim entirely on the bare fact that he had already refused to answer at the hearing in Dayton; but the transcript of neither the hearing nor the evidence at his trial contains even a suggestion that the purpose of the Committee was to punish him for contempt. In these circumstances, petitioner is in effect either imputing improper motives to the Committee on the basis of inference alone or he is making the extreme contention that a Congressional committee can never subpoena a witness after he has appeared before the Committee and has refused to answer some questions. This Court in *Watkins v.*

United States, 354 U.S. 178, and *Barenblatt* categorically refused to impute improper motives to Congressional committees. *Watkins* stated that, while Congress has no "power to expose for the sake of exposure," the courts cannot test "the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served" (354 U.S. at 200). Similarly, *Barenblatt*, in rejecting a claim that the "true objective of the Committee and of the Congress was purely 'exposure'," held that, "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power" (360 U.S. at 132). Similarly, in *Wilkinson v. United States*, *supra*, 365 U.S. at 412, in answer to a contention that a subcommittee's purpose in subpoenaing a witness was to subject him to public censure, the Court held that "it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner." These holdings are particularly applicable here since, not only was the Committee acting within the boundaries of Congress' constitutional power but there is a total lack of evidence supporting petitioner's contrary contention.

As to petitioner's suggestion that a Congressional committee can never recall a witness after he has already refused to answer questions, a committee may well have good reason to subpoena a wit-

ness when he has refused to answer its questions. There are several valid reasons for such action. First, the committee may believe that, under different circumstances, the witness will be more cooperative. Second, the committee may wish to emphasize to the witness the importance to its investigation of the information possessed by the witness in order to persuade him to answer. And, third, the committee may wish to ask additional questions.

The uncontradicted evidence in this case shows that the committee decided to subpoena petitioner again for all three reasons. As to the first reason, the transcript of petitioner's appearance at the Dayton hearing shows that the subcommittee was then composed of only one member, which was not a quorum. While this was not the reason which petitioner stated for his refusal to answer, the Committee counsel testified at petitioner's trial that he believed that petitioner was influenced in refusing to answer by the fact that the subcommittee before which he appeared was not legally constituted. Therefore, the Committee counsel testified he thought that petitioner might cooperate if subpoenaed to testify in Washington before a properly constituted tribunal (see *supra*, p. 4).

Second, when the hearings in Dayton were over, the Committee was left with a "missing link" as to its information concerning Communist activity at Antioch College and Yellow Springs (see *supra*, p. 6). Since the Committee had reason to believe that petitioner had knowledge of this missing information, it had a particularly good reason to subpoena him. Before asking the question involved in count 3,

the subcommittee twice described to petitioner the important information that it was missing, in order to convince him to testify (see *supra*, pp. 7, 8-9). The fact that this effort was unsuccessful in convincing petitioner to answer did not make the Committee's purpose in subpoenaing him any less reasonable and proper.

And, finally, the questions on which petitioner was convicted, as well as almost all the other questions, were not asked at the Dayton hearing. At Dayton, the subcommittee asked petitioner concerning Herbert Reed only whether he knew him (he said yes) and whether he knew Reed's occupation (he said no) (Hearings, p. 7011.) He was not asked any question concerning Reed's activities at Antioch College or in Yellow Springs as a Communist Party organizer, which was the subject underlying the questions involved in counts 2 and 3—whether Reed had encouraged petitioner to join the Communist Party or had anything to do with petitioner's getting in. Similarly, the only question asked petitioner at the Dayton hearing concerning Communist activities at Antioch College and in Yellow Springs was whether, when he was a student at Antioch prior to 1942, he knew of the existence of a Young Communist League organization in the student body (Hearings, p. 7010). The question which is involved in count 4 is whether petitioner knew of a Communist Party group in Yellow Springs composed in part of faculty members and students at Antioch College in 1945 or 1946. Thus, all three questions as to which petitioner was convicted had not been asked at the Dayton hearing and indeed involved new areas of inquiry by the Committee. Fur-

thermore, the Committee wanted to question petitioner concerning Walter Lohman. No questions concerning Lohman had been asked at the Dayton hearing. In contrast, at the Washington hearing, the subcommittee asked a series of questions on this subject (see *supra*, p. 9). Clearly, a Congressional committee can subpoena a witness to ask new questions which are pertinent to a subject under inquiry even if he has earlier refused to answer different questions, since it cannot be sure that the witness will refuse to answer these new questions. This is particularly true when the witness makes no broad statement at the earlier hearings indicating that he will refuse to answer all questions or questions within a specified area (see *supra*, pp. 18-20).

We have seen that there were three reasons why the Committee could reasonably believe that petitioner might answer questions at the hearing in Washington although he had refused to answer questions in Dayton. In addition, this Court has suggested that even a brief lapse of time, without anything else, is sufficient justification for a Congressional committee to recall a noncooperative witness in hopes that he has changed his mind. In *Flazer v. United States*, 358 U.S. 147, 151, the committee told a witness who had refused to produce documents to return later with the documents. This Court, in holding that the refusal to produce at the first hearing was excused, said that "for all we know, a witness who was adamant and defiant on October 5 might be meek and submissive on October 15." Here petitioner was subpoenaed to testify in Washington over two months after he had appeared in Dayton.

IV

THE GOVERNMENT PROVED AT PETITIONER'S TRIAL THAT THE QUESTIONS WERE PERTINENT TO THE SUBJECT UNDER INQUIRY

Petitioner contends (Pet. Br. 64-66) that the government failed to prove at his trial that the questions were pertinent to the subject under inquiry. This contention must be rejected.¹²

A. THE SUBJECT UNDER INQUIRY WAS COMMUNIST ACTIVITIES IN THE DAYTON-YELLOW SPRINGS AREA

At the start of the hearing in Dayton, the chairman of the subcommittee made an opening statement explaining the purpose of the hearing. After explaining the dangers from Communism in the United States, he added, *inter alia* (R. 42):

Over a considerable period of time the committee received complaints and requests for an investigation from the Dayton-Yellow Springs area. * * * As a result of our staff's investigation and report, the full committee ordered these hearings.

¹² Petitioner does not raise the distinct issue whether "the pertinency of the interrogation to the topic under the congressional committee's inquiry [was] brought home to the witness at the time the questions [were] put to him." *Deutch v. United States*, 367 U.S. 456, 467-468. The reason is, undoubtedly, that he failed to object before the subcommittee to the pertinency of the questions and therefore was precluded from raising the issue at his trial (see our brief in *Shelton*, *supra*, pp. 25-29). In any event, as our discussion of the government's proof of pertinency at petitioner's trial will show (see *infra*, pp. 23-34), petitioner was apprised of the subject under inquiry, and the questions he refused to answer were either pertinent on their face to this subject or the subcommittee explained their pertinency to him.

Petitioner was questioned at the hearing concerning Communist activities in Dayton and at Antioch College, which is in Yellow Springs (Hearings, pp. 7010-7011). Petitioner, however, refused to answer these questions.

The Committee counsel reported to the Committee that he thought petitioner's refusal to answer had been influenced by the fact that his appearance had not been before a legally constituted subcommittee and that he might cooperate if called to testify in Washington. The subcommittee had heard considerable testimony at Dayton concerning Communist activities at Antioch College, but there was an important gap in its information which the Committee was very anxious to fill. Since the Committee thought, on the basis of its information concerning petitioner, that he had this information, it subpoenaed him to testify in Washington (see *supra*, pp. 4, 6).

At the start of the hearing in Washington the subcommittee chairman stated that the hearing was a continuation of the September hearings in Dayton, as well as of hearings conducted in Michigan (Hearings, p. 7077). The subcommittee explained at considerable length, during petitioner's appearance in Washington, that it had information of Communist activities at Antioch College. More specifically, the subcommittee told petitioner that it had heard testimony concerning a cell of the Young Communist League at Antioch and that this group was organized and conducted by Herbert Reed (see *supra*, pp. 7-8). The Committee counsel said: "What the committee undertook to indicate was the chain of events that

had been established by Reed organizing this group and then following it up and getting the young people into the Communist Party after going into industry was a very likely thing to happen" (R. 127). Petitioner was then asked the question involved in count 2: whether Herbert Reed encouraged petitioner to join the Communist Party after he left Antioch (R. 127). After petitioner was again told of Communist activities at Antioch, he was asked whether Reed had anything to do with petitioner's getting into the Communist Party (count 3) (R. 128). And after the subcommittee repeated it knew of a Young Communist League group at Antioch in 1939 to 1941 and of a Communist Party group in Yellow Springs in 1945 and 1946, petitioner was asked if he knew of the existence of the latter group in 1945 or 1946 (count 4) (R. 129). Subsequently, petitioner was asked a series of questions all of which concerned his Communist activities in the Dayton-Yellow Springs area (Hearings, pp. 7082-7088).

Petitioner, however, relying solely on a single statement of the Committee counsel at his trial, contends (Pet. Br. 64) that the subcommittee was not investigating any particular subject at the hearings, i.e., it was investigating Communist activities generally. These statements—like similar statements made at the trial in *Shelton v. United States*, *supra* (see our brief, pp. 33-38), *Liveright v. United States*, *supra* (see our brief, pp. 45-46), *Price v. United States*, No. 12, this Term (see our brief, pp. 29-30), and *Whitman v. United States*, No. 10, this Term (see our brief, pp. 44-46)—was apparently an attempt to claim that the subcommittee was not required, by the Committee's

authorizing resolution or otherwise, to limit its investigation to a particular subject within the general subject of Communist activities." If another subject within the authority of the Committee was opened up by the testimony of a witness, the subcommittee was not precluded from pursuing it. But this does not mean that, absent the announcement of a new subject, the subcommittee was not investigating the particular subject stated at the hearing.

B. THE QUESTIONS WERE CLEARLY PERTINENT TO THE SUBJECT UNDER INQUIRY

The three questions which petitioner refused to answer and on which he was convicted were plainly pertinent to the subject under inquiry—Communist activities in the Dayton-Yellow Springs area. The questions involved in counts 2 and 3 were whether Herbert Reed had encouraged petitioner to join the Communist Party after he left Antioch College or had anything to do with petitioner's joining the Communist Party. Herbert Reed had been identified by witnesses before the subcommittee—as petitioner was

"The Assistant United States Attorney clearly stated this position (R. 43):

It is the position of the Government that this particular committee may call anyone available to it as a witness to inquire about matters that have to do with its resolution, that is, subversive activities, no matter who that person may be, because it has been held that personnel is part of the subject, and the numbers of persons that are engaged in that activity or that know about it would be possible sources of information. In spite of that position, that we do that, we also feel that we are entitled, nevertheless, to offer proof of special pertinency.

told when he testified—as a Party organizer in Dayton and the organizer and leader of a Communist Party organization at Antioch College in Yellow Springs (see *supra*, pp. 7-8). Petitioner had testified at the hearing in Dayton that, when he left Antioch College in 1942, he worked in Dayton and after 1948 in Yellow Springs (see *supra*, p. 4).

The question involved in count 4—whether petitioner had any knowledge of a Communist Party group in Yellow Springs composed, in part, of faculty members and students at Antioch—was pertinent on its face to the subject under inquiry. In addition, the subcommittee had heard testimony—as petitioner was specifically told—that such a group existed in 1945 or 1946 (see *supra*, pp. 6, 7, 8-9).

V

PETITIONER WAS NOT ENTITLED TO DISMISSAL OF THE INDICTMENT OR A HEARING ON THE BASIS OF BROAD ALLEGATIONS THAT GOVERNMENT EMPLOYEES GENERALLY ARE BIASED

Petitioner contends (Pet. Br. 23-41) that the indictment should have been dismissed since the grand jury included government employees who were biased against him because the government's loyalty and security programs made them afraid to appear to be sympathetic with Communism. Alternatively, petitioner claims (Pet. Br. 40-41) that he was entitled to a hearing in the district court to allow him to prove

bias." We show, however, in our brief in *Shelton v. United States*, *supra*, pp. 62-64, that a defendant is not entitled to dismissal of an indictment merely because government employees were on the grand jury. We also show in *Shelton*, pp. 64-76, that a defendant is entitled to a hearing to inquire into the motives and beliefs of grand jurors—even if we assume, contrary to the holdings of numerous cases, that a defendant is sometimes entitled to such a hearing—only when he alleges specific and convincing facts of strong bias in individual grand jurors. Here, unlike in *Shelton* (see our brief in *Shelton*, pp. 77-78), *Liveright v. United States*, *supra*, and *Price v. United States*, *supra*, petitioner's affidavit (R. 9-15), accompanying his Motion to Dismiss the Indictment (R. 7-9) and his Motion for Hearing on Qualifications of Grand Jurors (R. 5-6), did state some facts underlying his contention of fear and intimidation among government employees generally resulting from the security program which petitioner would show if a

"Petitioner further contends (Pet. Br. 40-41) that, even if he was only entitled to a hearing on his motion to dismiss at the time the motion was made, he is now entitled to a dismissal of the indictment. He reasons that a hearing in 1961 or 1962 cannot determine the bias of grand jurors at the time the indictment was returned in 1954. But the courts frequently determine just such issues. While grand jurors who might be questioned in 1962 at a hearing as to their bias in 1954 might be hesitant to admit their bias, this would also have been true if the hearing had been held in 1956 when the petitioner's motions were submitted. Persons do not like to admit bias no matter when they are questioned. But they are at least as likely to admit it when it has occurred years before as in the recent past.

hearing were granted." But like in *Shelton*, *Live-right*, and *Price*, petitioner did not allege bias or fear with regard to any individual grand jurors (see our brief in *Shelton*, pp. 76-77). In these circumstances, the trial court properly refused to grant petitioner a hearing to conduct a general exploration of the motives and beliefs of the grand jurors.

VI

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECT UNDER INQUIRY OR THE PERTINENCY OF THE QUESTIONS TO THE SUBJECT

The indictment alleged that the questions petitioner refused to answer "were pertinent to the question

"Petitioner's affidavit quotes (R. 19-18) from affidavits of Dr. Marie Jahoda and Dr. Stuart W. Cook, who collaborated on a study of the impact of the security program on Government employees in the District of Columbia. Petitioner's affidavit states that he would call Dr. Jahoda and Dr. Cook, as well as other named students of the security program, to testify if a hearing were granted (R. 14-15).

It is significant that the study made by Dr. Jahoda and Dr. Cook—which is the only basis for petitioner's allegations beyond his own counsel's opinion—was a preliminary investigation for the purpose of formulating plans for more extensive research. It consisted of interviewing only seventy Government employees, from a dozen agencies, of whom "many" had felt the impact of the loyalty and security programs. In describing this study, Dr. Jahoda and Dr. Cook have stated that they "made no attempt to select a sample of respondents which could be said to be representative of any specified population." Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 Yale L.J. 308, 309. And Professor Cook states in his affidavit that "no definite statement can be made about the frequency among the total population of government employees reactions similar to those found among those individuals we interviewed."

then under inquiry" (R. 2). Petitioner claims (Pet. Br. 41-50) that the indictment was invalid because it failed to specify the subject under inquiry when petitioner testified or to specify the pertinency of the questions he refused to answer to this subject.

In our brief in *Shelton v. United States*, *supra*, pp. 78-83, we argue that petitioner's contention that the indictment was required to state the specific subjects under inquiry is inconsistent with Rule 7(c) of the Federal Rules of Criminal Procedure, and with decisions both of this Court and the courts of appeals.¹⁷ For the same reasons, an indictment which states that the questions are pertinent to the subjects under inquiry need not provide the reasoning underlying this allegation of pertinency.

¹⁷ Petitioner claims (Pet. Br. 44-45) that the indictment's failure to specify the subject under inquiry prevented him from properly preparing his defense. But, as we have seen (*see supra*, pp. 33-34), the transcripts of both the hearings in Dayton and in Washington, which were available to petitioner, clearly showed the subject under inquiry. The fact that petitioner did not ask for a bill of particulars strongly indicates that he understood the subject under inquiry.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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